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United States
1 1296
Circuit Court of Appeals

For the Ninth Circuit.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Plaintiff in Error,

vs.

JOHN T. LITTLEJOHN,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Arizona.

FILED
JUL - 6 1921
F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,
Plaintiff in Error,
vs.
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Names and Addresses of Attorneys of Record.

Messrs. FAVOUR & CORNICK, Prescott, Arizona,
Attorneys for Plaintiff in Error.

Messrs. O'SULLIVAN & MORGAN, Prescott,
Arizona,
Attorneys for Defendant in Error. [1*]

In the Superior Court of Yavapai County, State
of Arizona.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Complaint.

Plaintiff complains of defendant corporation and
for cause of action states and alleges:

I.

That plaintiff is a resident of Yavapai County,
State of Arizona; that defendant, United Verde
Extension Mining Company is a corporation duly
organized and existing according to law, and was
during all the times herein mentioned and still is
doing and carrying on a smelting and ore reduction
business in the Verde Mining District, Yavapai
County, State of Arizona.

*Page-number appearing at foot of page of original certified Transcript
of Record.

II.

That heretofore, to wit, on the 2d day of June, 1920, and for a long time prior thereto, in the Verde Mining District, county of Yavapai, State of Arizona, the defendant corporation was the owner of, and was then and there operating and conducting a certain smelter and ore reduction works, together with all appurtenances thereto belonging or in anywise appertaining, in the sampling, treating, reducing and smelting of ores and minerals. That defendant's said smelter and ore reduction plant, together with its appurtenances, did then and [2] there consist of smelters, mills, shops, works, yards, plants and factories where steam, electricity and other mechanical power was then and there used to operate the machinery and appliances, in and about said smelter and ore reduction works and appurtenances aforesaid.

III.

That on, to wit, said 2d day of June, 1920, and for some time previous thereto, plaintiff was and had been employed by defendant corporation as a laborer in what was designated and known as the "Bull Gang"; that plaintiff, as directed by defendant corporation and as such employee in said "Bull Gang," did work in and around said smelter and ore reduction works and in and around the mills, shops, works, yards, plants, factories and other buildings and appurtenances thereto belonging; that plaintiff's work as an employee of defendant corporation as aforesaid did consist of pick

and shovel work, clearing up the yards, loading and unloading brick and lime, laying track for ore and slag cars, drilling holes in slag dumps, assisting in repairing said smelter and ore reduction works, together with the said appurtenances, and in installing machinery, fixtures and equipments in said smelter and ore reduction works and appurtenances thereto.

IV.

That on said 2d day of June, 1920, while employed by defendant corporation as aforesaid, plaintiff did then and there receive and suffer severe and permanent personal injuries, hereinafter fully set forth, and which said personal injuries were then and there caused by an accident arising out of and in the due course of said labor, service and employment, and was due to a condition or conditions of said occupation and employment, and which said injuries were not caused by the (2) [3] negligence of said plaintiff; and which said personal injuries did occur in manner following, to wit:

That on the said 2d day of June, 1920, at about the hour of ten o'clock in the forenoon of said day, while plaintiff was then and there in the employ of the defendant corporation as aforesaid, he, the said plaintiff, was directed and ordered by said defendant corporation and its foreman in charge of said "Bull Gang," to assist in installing certain equipments, in defendant's sample-mill then and there being a mill used by defendant to sample, treat and crush ores, and said sample-mill

4 *United Verde Extension Mining Company*

then and there being a part of said smelter and ore reduction works, and an appurtenance thereto; that plaintiff did thereupon engage in said work as directed; that while plaintiff was assisting in putting in said equipment in said sample-mill, he was then and there ordered and directed by defendant corporation and its said foreman of said "Bull Gang" to place and install in the framework of certain rolls or rollers in said sample-mill a large iron bolt or rod approximately four feet in length by about two inches in diameter, and weighing approximately one hundred pounds; that plaintiff, while then and there in the due course of his said occupation and employment, was then and there ordered and directed by defendant and its said foreman of said "Bull Gang" to take said iron bolt or rod and go upon a certain board platform then and there covering a certain concrete pit about ten feet deep by about the same dimensions in width and length; and then and there situate below said platform and in said sample-mill aforesaid; that plaintiff, as directed, did take said iron bolt or rod in his arms and did proceed to and upon said board platform for the purpose of placing and installing the same as aforesaid; that when plaintiff arrived on said board platform covering said concrete pit, he, the said plaintiff, did then (3) [4] and there with his hands and arms elevate said iron bolt or rod preparatory to placing the same in the frame work of said rolls or rollers as directed and ordered so to do, but that while plaintiff had said iron bolt or rod in his arms partially

raised and ready to place the same as aforesaid, the plank upon which he was then and there standing suddenly and without warning did break, thereby violently precipitating plaintiff and said iron bolt or rod through said broken plank and platform to the bottom of said concrete pit, a distance of approximately ten feet; that in falling through said broken plank and platform to the bottom of said concrete pit, plaintiff did then and there and thereby suffer great, serious and permanent bodily injuries as follows: That his head, arms, legs and body struck the bottom of said concrete pit, with great force and violence, and he was struck by said iron rod or bolt in its descent to the bottom of said concrete pit; that thereby he was rendered unconscious; that his skull, frontal bone, temples and left side of his head were bruised, injured and damaged; that his shoulders, legs, arms, neck and other portions of his body were also bruised and injured; that by reason of said fall, he did receive a severe concussion of the brain, spinal column and shock to his nervous system; that said injuries are permanent. That by reason of said injuries plaintiff did suffer and endure great physical and mental pain and anguish and will permanently suffer the same; that by reason of said personal injuries aforesaid, and the consequent physical and mental pain, suffering and anguish, plaintiff has sustained general damages in the sum of Ten Thousand Dollars (\$10,000.00).

V.

That plaintiff is fifty-seven years of age and (4)

[5] prior to receiving said personal injuries was an able-bodied man and in good health; that he was earning the sum of \$4.60 per day, and would have earned at least that sum per day during the rest of his natural life, had he not received said injuries; that by reason of said personal injuries plaintiff has been unable to work, save and except for a period of about seventeen days (when he was put to work by defendant corporation, and then discharged by it). That he has sustained special damages for loss of time by reason of said injuries in the sum of \$4.60 per day from June 2, 1920, until the trial of this cause, less said period of seventeen days aforesaid.

VI.

That this action is brought under and by virtue of the laws of the State of Arizona, in such case made and provided, viz., by virtue of the provisions of Chapter VI of Title XIV, Revised Statutes of Arizona, 1913, said Chapter VI aforesaid being entitled "Liability of Employers for Injuries to Workmen in Dangerous Occupations." That plaintiff's employment, as aforesaid, at the time of said injury, was a dangerous and hazardous occupation, because of risks and hazards which are inherent in such occupations, as defined by the terms and provisions of said Chapter VI of Title XIV, Revised Statutes of Arizona, 1913, aforesaid.

VII.

That by reason of said personal injuries described aforesaid, said plaintiff has suffered general damages in the sum of Ten Thousand Dollars

(\$10,000.00); that by reason of loss of time and loss of wages as alleged aforesaid, plaintiff has suffered special damages in the sum of \$4.60 per day from (5) [6] *from* June 2, 1920, until the trial of this cause, less a period of seventeen days.

WHEREFORE, plaintiff, John T. Littlejohn, prays judgment against the defendant, United Verde Extension Mining Company, a corporation, as follows:

1. For the sum of Ten Thousand Dollars (\$10,000.00) general damages for personal injuries sustained, including physical and mental pain, suffering, anguish ~~and~~ distress.

2. For the sum of \$4.60 per day from June 2, 1920, until the trial of this cause (less a period of seventeen days), for special damages for loss of time (and loss of wages) occasioned by reason of said personal injuries sustained.

3. For costs of suits.

O'SULLIVAN & MORGAN,

Attorneys for Plaintiff.

[Endorsed]: Filed 1:30 o'clock P. M. Aug. 10, 1920. J. C. Woods, Clerk. By P. V. Clibborn, Deputy. (6) [7]

[Endorsements]: L-85 (Prescott). #7922. Complaint, Notice of Petition for Removal, Bond for Removal and Order for Removal, in Cause No. 7922. John T. Littlejohn, Plaintiff, vs. United Verde Extension Mining Co., a Corporation, Defendant. Filed Sept. 20, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk.

(CLERK'S NOTE: The foregoing complaint, together with the other papers mentioned in the foregoing endorsement, were filed in the District Court of the United States for the District of Arizona, September 20, 1920, on removal from the Superior Court of Yavapai County, State of Arizona.

C. R. McFALL,
Clerk.) [8]

In the District Court of the United States, in and
for the District of Arizona.

No. L-85—PRESCOTT.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Motion to Strike.

Comes now the above-named defendant and respectively moves the Court that the following portions of plaintiff's complaint be struck out as irrelevant, immaterial, speculative and as contrary to the provisions of the statute and statutory liability upon which plaintiff's cause of action is stated to be brought:

I.

In paragraph V of plaintiff's complaint, on page 5 thereof, at line 7, the following clause:

“when he was put to work by defendant corporation and then discharged by it.”

II.

In paragraph V of plaintiff's complaint, on page 5 thereof, the last sentence of said paragraph: “That he has sustained special damages for loss of time by reason of said injuries in the sum of Four and 60/100 (\$4.60) Dollars per day from June 2, 1920, until the trial of this cause, less said period of seventeen (17) days aforesaid.”

III.

In paragraph VII of plaintiff's complaint, on page 5 thereof, at the third line of said paragraph: “that [9] by reason of loss of time and loss of wages as alleged aforesaid plaintiff has suffered special damages in the sum of Four and 60/100 (\$4.60) Dollars per day from June 2, 1920, until the trial of this cause less a period of seventeen (17) days.”

IV.

All of paragraph II of plaintiff's prayer for judgment on page 6 of plaintiff's complaint.

FAVOUR & CORNICK,

Attorneys for Defendant.

[Endorsements]: Copy received this 16th day of October, 1920.

O'SULLIVAN & MORGAN,

Attys. for Plnf.

Filed Oct. 18, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [10]

10 *United Verde Extension Mining Company*

In the District Court of the United States, in and
for the District of Arizona.

L-85—PRESCOTT.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Answer.

Now comes the above-named defendant and
answers to plaintiff's complaint as follows:

DEMURRERS.

I.

Defendant demurs to the whole of said complaint
on the ground that it appears on the face thereof
that the facts stated therein are not sufficient to
constitute a cause of action against this defendant.

WHEREFORE, defendant prays judgment as
to the sufficiency of said complaint, and for its
costs.

FAVOUR & CORNICK,
Attorneys for Defendant.

II.

Without waiving its foregoing demurrers, de-
fendant demurs to said complaint on the ground
that the facts stated do not show any cause of
action for special damages as prayed for.

WHEREFORE, defendant prays judgment as to the sufficiency of said complaint, and for its costs.

FAVOUR & CORNICK,
Attorneys for Defendant. [11]

III.

Without waiving its foregoing demurrers defendant demurs to said complaint on the ground that the facts stated do not support or allege a cause of action for special damages under the Employers' Liability Law upon which plaintiff's complaint is based.

WHEREFORE, defendant prays judgment as to the sufficiency of said complaint, and for its costs herein.

FAVOUR & CORNICK,
Attorneys for Defendant.

PLEA IN BAR.

I.

Further answering said complaint but without waiving any of its foregoing demurrers the defendant denies each and every, all and singular, the allegations in said complaint contained.

II.

Further answering said complaint but without waiving any of the defenses hereinbefore interposed, defendant alleges that if the plaintiff was injured, either as alleged in his complaint or otherwise, which injuries are not admitted but are expressly denied by defendant, the said injuries resulted from and were wholly caused by the negligence of said plaintiff in failing to take that care

12 *United Verde Extension Mining Company*

and caution which a man of ordinary prudence would take under similar conditions.

WHEREFORE, defendant prays judgment and for dismissal of this action and for its costs.

FAVOUR & CORNICK,
Attorneys for Defendant. (2)

[Endorsements]: Answer. Copy received this 16th day of October, 1920.

O'SULLIVAN & MORGAN,
Attorneys for Pltf.

Filed Oct. 18, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [12]

At a regular term, to wit, the November, 1920, Term of the United States District Court for the District of Arizona, held in the courtroom of said court in the city of Tucson, State and District of Arizona, on Monday, the 8th day of November, A. D. 1920—Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry—November 8, 1920.)

L-85—PRESCOTT.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

(Minutes of Court—November 8, 1920—Order on Defendant's Demurrer—Order on Defendant's Motion to Strike.)

IT IS ORDERED that defendant's demurrer be and the same is hereby overruled.

IT IS ORDERED that the first ground of defendant's motion to strike, be and the same hereby is sustained; that the second ground thereof be and the same is hereby overruled; that the third ground thereof be and the same hereby is sustained in part by striking out the words "and loss of wages"; and that the fourth ground thereof be and the same hereby is sustained in part by striking out from the prayer of the complaint the words "and loss of wages." [13]

At a regular term, to wit, the September, 1920, Term of the United States District Court for the District of Arizona, held in the courtroom of the said court, in the city of Prescott, State and District of Arizona, on Friday, the 26th day of November, A. D. 1920, at the hour of 9:30 o'clock A. M.—Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

14 *United Verde Extension Mining Company*

(Minute Entry—November 26, 1920.)

L-85—(PRESCOTT).

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

**Minutes of Court—November 26, 1920—Order Al-
lowing Defendant an Exception to Court's Rul-
ing on Demurrer and Motion to Strike.**

On motion duly made, IT IS ORDERED that defendant may have an exception to the ruling of the Court of November 8, 1920, on defendant's demurrer and motion to strike. [14]

At a regular term, to wit, the September, 1920, Term of the United States District Court for the District of Arizona, held in the courtroom of the said court, in the city of Prescott, State and District of Arizona, on Friday, the 26th day of November, A. D. 1920—Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry—November 26, 1920.)

L-85—(PRESCOTT).

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Minutes of Court—November 26, 1920—Trial.

This case coming on regularly for trial this day, come now Messrs. O'Sullivan & Morgan, for and on behalf of the plaintiff, and also the plaintiff in person; and come also Messrs. Favour, Cornick and Baker, attorneys for defendant. Both sides announce ready for trial. Thereupon eighteen jurors are called into the jury-box by the clerk and duly sworn to answer as to their qualifications, and are then examined by respective counsel; thereupon respective counsel exercise their peremptory challenges, and the following twelve jurors are selected to try this case and duly sworn for that purpose, viz.: L. F. Nailson, W. E. Spaulding, Fletcher B. Howard, Wm. Lawler, A. W. Davis, Wm. Johnson, W. R. Uber, Lewis A. Cross, W. H. Mackay, Wm. Beeson, J. C. Lusk, and Tom Richards.

P. W. O'Sullivan, Esquire, reads the complaint filed herein aloud to the jury. Ben Rudderow is sworn as court reporter for defendant. John T. Littlejohn, the plaintiff, is sworn and examined, and cross-examined. The defendant moves the

Court to declare a mistrial, motion overruled to which ruling of Court defendant duly excepts. The plaintiff to further maintain the issues on his part calls the following witnesses each of whom is in turn duly sworn, [15] examined and cross-examined, viz.: J. B. McNally, Frank Clark, Robert E. Lee, Harry Garrison and Mrs. Sarah Littlejohn. And thereupon the plaintiff rests his case.

Thereupon the defendant for the purpose of maintaining on his part the issues herein calls the following witnesses, each of whom is in turn duly sworn, examined and cross-examined, viz.: G. S. Purtyman, Dr. James R. Moore, Dr. R. H. Thigpen, and Dr. H. T. Southworth, and thereupon the defendant rests its case. Whereupon the plaintiff to further maintain the issues on his part calls Sarah Littlejohn in rebuttal. The jury is then excused until 9:00 A. M. November 27th, A. D. 1920.

November 27, 1920. 9:00 A. M. same persons present at same place, and trial is continued with defendant moving for a directed verdict in favor of defendant. Motion overruled. Joseph H. Morgan makes opening argument for plaintiff: A. H. Favour and Arthur G. Baker argue on behalf of the defendant, and P. W. O'Sullivan makes final argument on behalf of plaintiff.

The defendant files requested instructions. The Court then instructs the jury orally, whereupon said jury retires in charge of bailiff, W. W. Lewis, who is first duly sworn for that purpose, to consider their verdict. After a time the jury return into open court in charge of their bailiff, and upon

being asked by the Court if they have agreed upon a verdict, through their foreman they state that they have agreed. Whereupon the said jury through their foreman present their verdict as follows:

L-85.

JOHN T. LITTLEJOHN,

Plaintiff,

against

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Verdict.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff and assess his damages at Eight Thousand Dollars 8000/00 Dollars.

A. W. DAVIS,

Foreman.

And, the clerk, inquiring of said jury if such is their verdict, [16] they state that is, and so say they all; whereupon the Court orders the verdict recorded, and the jury discharged from the case.

[17]

In the District Court of the United States in and
for the District of Arizona.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING CO.,
Defendant.

Motion for Directed Verdict.

Comes now the defendant at the close of the evidence and before argument of counsel and moves the Court to direct the jury to return a verdict in favor of the defendant, and as grounds assigns:

1. There is no evidence to sustain a verdict for the plaintiff.

2. The weight of the evidence preponderates in favor of the defendant and against the contention of the plaintiff.

3. This suit is brought under the Employer's Liability Law of Arizona, Chapter VI, Title 14, R. S. A. 1913, and there is no evidence of either the plaintiff or the defendant that the plaintiff was engaged at the time of the happening of the alleged accident and injury upon which the suit is founded in any of the occupations declared and determined to be hazardous within the meaning of said law.

4. There is no evidence in the record proving or tending to prove as required by Sec. 3158, R. S. A. 1913, that the accident and injury alleged arose out of and in the course of the employment of the plaintiff and was due to a condition or conditions

of such employment, or that the accident and injury alleged were not caused by the negligence of the plaintiff.

5. The evidence shows that the accident could have been avoided by the exercise of care which a reasonable and ordinarily prudent person would have exercised under the same conditions, and the said accident alleged was due to the negligence of the plaintiff.

6. Plaintiff has not introduced evidence to support, and [18] there is no evidence to support the allegations of the complaint that plaintiff was working in defendant's sample mill, or in any other building or structure where his occupation was hazardous as defined by the law aforesaid.

7. There is no evidence that the alleged accident was caused by any condition inherent in a hazardous occupation, but the evidence shows that the accident was due to ordinary and avoidable causes in no way conditions of hazardous occupation or any kind.

FAVOUR & CORNICK,

Attorneys for Defendant.

[Endorsed]: Filed Nov. 27, 1920. C. R. McFall,
Clerk. [19]

In the District Court of the United States, in and
for the District of Arizona.

No. L-85—PRESCOTT.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Judgment on Verdict.

This cause came on regularly for trial on the twenty-sixth day of November, 1920; the said parties were present in person and represented by their attorneys. Messrs. O'Sullivan & Morgan, counsel for plaintiff, and Messrs. Favour & Cornick and A. G. Baker, counsel for the defendant. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiff and defendant were duly sworn and examined and the cause was thereafter continued and tried on the twenty-sixth and twenty-seventh days of November, 1920. After hearing the evidence, the instructions of the Court and the arguments of the counsel, the jury retired to consider their verdict and subsequently on the twenty-seventh day of November, 1920, returned into court with their verdict signed by the foreman, in accordance with the law, and being called, answer to their names and say:

“In the District Court of the United States, in and
for the District of Arizona.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

VERDICT.

We, the jury, duly empaneled and sworn in the
[20] above-entitled action, upon our oaths, do find
for the plaintiff and assess his damages at eight
thousand dollars \$8000.00 Dollars.

A. W. DAVIS,
Foreman.”

NOW, THEREFORE, it is ORDERED, that
judgment be entered herein in favor of plaintiff,
John T. Littlejohn, and against the defendant,
United Verde Extension Mining Company, a cor-
poration, in accordance with the verdict in said
cause, in the sum of Eight Thousand Dollars
(\$8,000.00).

WHEREFORE, by virtue of the law and by rea-
son of the premises aforesaid, it is

ORDERED, ADJUDGED AND DECREED
that plaintiff, John T. Littlejohn, do have and re-
cover of and from the defendant, United Verde Ex-
tension Mining Company, a corporation, the sum
of Eight Thousand Dollars (\$8,000.00), with interest
thereon at the rate of six per cent per annum from

date hereof until paid, and for plaintiff's costs incurred and expended in said action, taxed at the sum of One Hundred Nine & 40/100 Dollars; and that execution issue.

Dated and entered in open court this 27th day of November, 1920. (2) [21]

In the District Court of the United States, in and
for the District of Arizona.

No. L-85—PRESCOTT.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

**Motion in Arrest of Judgment and to Set Aside
Verdict.**

Comes now the defendant and moves the Court to set aside the verdict in the above cause and to arrest the judgment therein based upon, or to be based upon said verdict, and as grounds assigns the following:

I.

On the face of the pleadings and the verdict it is manifest that the jury by their verdict did not pass fully and adequately on all material issues, in that, the plaintiff raised in his complaint two separate and distinct material issues, to wit, a pleading and

prayer for general damages and independently a pleading and prayer for special damages, whereas the verdict simply assessed damages without stating or showing whether they were assessed as, and in response to, the issue for general damages or to the issue for special damages.

II.

The verdict is irresponsible for the reasons stated above, and especially because the verdict does not show whether the damages assessed are assessed as general or special damages, [22] or as a lump sum including both; and if said damages so assessed were intended as general, then the verdict is clearly irresponsible to the issue of special damages as no special damages are then assessed; if said damages were intended as special damages, the verdict is irresponsible to the issue of general damages, and the special damages are manifestly excessive over and above approximately \$722.00; and if said damages were intended as a lump sum covering both general and special damages, there is no possible way of determining what proportion is intended as general and what proportion is intended as special damages, and the defendant is thereby deprived by said irresponsible verdict of his legal right to know and be informed, if excessive special damages were assessed contrary to law and in derogation of the defendant's lawful property rights.

III.

The verdict is uncertain for the reasons hereinabove set forth and especially because it cannot be determined therefrom whether or not the jury

passed upon the issue of general damages and not upon the issue of special damages, or passed upon the issue of special damages and not upon that of general damages; or passed upon both issues but failed to assess damages for but one of said issues, or passed upon both issues and included damages for both issues in a lump sum, failing to set forth the proportion assessed for each issue and thereby failing to return a complete, proper and legal verdict and a verdict upon both material issues of the cause.

IV.

The verdict is contrary to the law, for the reasons hereinbefore set forth and because the form of said verdict, its uncertainty, its failure to respond to and decide the two material (2) [23] issues, deprives the defendant of its legal right to be informed upon which of the two issues the verdict is returned against it, and if the verdict is against the defendant on both issues, then to be informed of the amount of damages assessed against defendant on each separate issue as set forth and specially pleaded in the complaint and upon which evidence was introduced.

V.

The verdict is against the law for the reasons hereinbefore set forth and because the verdict leaves open and undecided the question whether or not any damages have been assessed or omitted to be assessed on one of the two material issues against defendant and which issue it is that may not have been decided and disposed of by the jury and its

verdict; and because a verdict must be responsive, certain and legal and must decide all material parts of plaintiff's demand.

VI.

The verdict is void for the reasons herein set forth and a judgment based thereon is *ipso facto* void.

VII.

The verdict and any judgment based thereon is void, contrary to law and is not due process of law and seeks to deprive the defendant of its property without due process of law as said due process is guaranteed by the Fifth Amendment to the Constitution of the United States, and unless said verdict is set aside and the judgment thereon is arrested as prayed for herein the said defendant will be deprived of its property without due process of law and of its rights under the common law, all in violation of the said Fifth Amendment to the Constitution of the United States, and of the Seventh Amendment thereto. (3) [24]

WHEREFORE, defendant prays that this Honorable Court grant defendant's motion for such further and other relief as the Court may deem to be required by law.

FAVOUR & CORNICK,
Attorneys for Defendant. (4)

[Endorsements]: Service accepted this 1st day of December, 1920.

O'SULLIVAN & MORGAN,
Attys. for Plaintiff.

Filed Dec. 3, 1920. C. R. McFall, Clerk United States District Court for the District of Arizona.
[25]

In the District Court of the United States, in and
for the District of Arizona.

No. L-85—PRESCOTT.

JOHN J. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Motion for New Trial.

Comes now the defendant and without waiving its motion in arrest of judgment and to set aside verdict, respectfully moves the Court for a new trial for the following causes materially affecting substantial rights of the defendant. This application is based upon the pleadings and all papers filed in the case and the minutes of the Court and transcript of the testimony and instructions and upon all the grounds set forth in the said motion in arrest of judgment and to set aside the verdict filed herein, which is made a part hereof the same as if fully incorporated and set out herein.

I.

Irregularities in proceedings of the Court, jury and adverse party, and discretion by which the defendant was prevented from having a fair trial:

(1) Because the verdict was uncertain, irresponsible to the issues of both general and special damages and prejudicial to defendant's legal right to be informed what issues, if any, were found against him and whether the amount which should have been assessed on each issue so found was excessive. [26]

(2) Because the counsel for the plaintiff was permitted, over objection, to argue to the jury upon the decreased earning power of the dollar.

(3) Because the counsel for the plaintiff was permitted to argue to the jury upon the mortality tables, which had been admitted in evidence over the objection of defendant, and to argue that plaintiff would have earned a sum named in excess of \$25,000.00 during his expectancy of life, whereas plaintiff was asking for only \$10,000.00 and special damages.

(4) Because the counsel for the plaintiff was further permitted to argue to the jury in connection with said mortality tables that the wife of the plaintiff was entitled to a substantial sum in case plaintiff should die within a year or a short time.

II.

Excessive damages which appear to have been given under the influence of passion or prejudice or both in that:

(1) There was no evidence that the plaintiff had suffered permanent injury or incapacity.

(2) The amount named in the verdict, if considered as general damages, or as general and special damages combined, which is not admitted by defendant but specifically denied, is in excess of the cost

of a reasonable annuity based upon allowance of full pay for the full expectancy of life of a man of fifty-seven years permanently and totally incapacitated.

(3) The trial occurred too soon after the accident, if the alleged injury was claimed to be permanent and not temporary to warrant a determination of whether or not the recovery from the injuries alleged would be complete or partial. (2) [27]

III.

Insufficiency of the evidence to justify the verdict, in that no evidence was offered or introduced to prove that the plaintiff was not negligent, and no evidence was offered or introduced that the accident was due to an inherent hazard of a hazardous occupation or to a condition of the employment.

IV.

The verdict is against the law for all the reasons set forth herein.

V.

Errors of law to the prejudice of the defendant at the trial, to wit:

(1) The Court erred in overruling the defendant's motion to strike from the complaint the allegations and prayer for special damages on account of alleged loss of time, and in overruling defendant's special demurrer to the complaint based upon the allegations of special damages.

(2) The Court erred in overruling the defendant's general demurrer to the complaint, for the reason that upon the face thereof it appeared that the accident was not one inherent to a condition of a hazardous occupation.

(3) The Court erred in permitting the plaintiff, over the objection of the defendant, to testify that after working seventeen days subsequent to the time of the accident he was discharged because he stated he was told that he could not do the work laid out for him.

(4) The Court erred in denying the motion of the defendant to declare a mistrial because of testimony of the plaintiff in reference to what was told him by one E. H. Thompson concerning insurance assumed to have been carried by the defendant to cover accidents to employees. (3) [28]

(5) The Court erred in admitting in evidence, over objection and exception of defendant, the American Mortality Tables, for the reason that no evidence was introduced to show the applicability thereof to the plaintiff.

(6) The Court erred in denying the motion of the defendant that the jury be directed to return a verdict for the defendant, at the close of the evidence, upon the ground and for the reasons set forth in said motion, which is hereby incorporated and made a part hereof the same as if fully set out, and for the reason that the evidence showed that the alleged accident was an avoidable occurrence and not an accident due to an inherent risk of a hazardous occupation and due to a condition of the employment therein.

(7) The Court erred in instructing the jury that mortality tables might be considered and in making reference to and permitting reference to be made to the said tables.

VI.

The Court erred in refusing to give defendant's instructions numbers 3, 6, 7 and 10.

VII.

The Court erred in giving, over objection, plaintiff's instructions 1, 2, 3 and 4.

WHEREFORE, defendant prays that the verdict and judgment be set aside and that a new trial be ordered, and for such other order as to the Court may seem proper.

FAVOUR & CORNICK,

Attorneys for Defendant. (4)

Dated Prescott, Arizona, December 18, 1920.

[Endorsements]: Service accepted this 20th day of Dec., 1920.

O'SULLIVAN & MORGAN,

Attys. for Plaintiff.

Filed Dec. 21, 1920. C. R. McFall, Clerk. By
Clyde C. Downing, Deputy Clerk. [29]

At a regular term, to wit, the November Term, 1920, of the United States District Court for the District of Arizona, held in the courtroom of the said court, in the City of Tucson, State and District of Arizona, on Monday, April 4, 1921—Honorable WILLIAM H. SAWTELLE, District Judge Presiding.

(Minute Entry—April 4, 1921.)

L-85—(PRESCOTT).

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

**(Minutes of Court—April 4, 1921—Order Overruling
Motion in Arrest of Judgment and Motion to
Set Aside Verdict, and Motion for a New Trial.)**

The defendant's motion in arrest of judgment and motion to set aside verdict herein, having been submitted to the Court and the Court having fully considered the same, and being fully advised in the premises, does now order that said motion in arrest of judgment and motion to set aside verdict herein, be and the same are hereby overruled, to which ruling of the Court the defendant notes an exception.

And, it is further ordered by the Court that the defendant's motion for a new trial heretofore submitted to the Court, be and the same is hereby overruled—to which ruling of the Court the defendant notes an exception. [30]

In the District Court of the United States, in and
for the District of Arizona.

No. L-85—PRESCOTT.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

**Order Extending Time to File Bill of Exceptions to
and Including May 3, 1921.**

It appearing that no other extension of time has been made by stipulation or order for the purpose of allowing the defendant reasonable time within which to prepare and serve its bill of exceptions, the motions to set aside verdict, in arrest of judgment and for new trial having been overruled April 4, 1921—

IT IS HEREBY ORDERED that the above defendant shall have thirty (30) days from said April 4, 1921, within which to serve upon the plaintiff or his counsel a bill of exceptions, to wit, unto and including Tuesday, May 3, 1921.

Dated this 11th day of April, 1921.

WM. H. SAWTELLE,
Judge.

[Endorsements]: Copy received April 6, 1921.

O'SULLIVAN & MORGAN,

Attys. for Plaintiff.

Filed April 11, 1921. C. R. McFall, Clerk. [31]

In the District Court of the United States, in and
for the District of Arizona.

No. L-85—PRESCOTT.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Application for Fixing Amount of Supersedeas Bond.

The defendant in the above cause will petition this Court for a writ of error, and respectfully requests the Court to make an order fixing the amount of the supersedeas bond to be furnished by the defendant; and further,

Respectfully requests that the said amount of said bond be fixed at the sum of Eighty-five Hundred Dollars (\$8,500).

FAVOUR & CORNICK,
Attorneys for Defendant.

[Endorsements]: Copy received April 14, 1921.

O'SULLIVAN & MORGAN,
Attorneys for Plaintiff.

Filed April 15, 1921. C. R. McFall, Clerk. By
Clyde C. Downing, Chief Deputy Clerk. [32]

At a regular term, to wit, the April Term, 1921, of the United States District Court for the District of Arizona, held in the courtroom of the said court in the Federal Building, city of Phoenix, State and District of Arizona, on Monday, the 18th day of April, A. D. 1921—Honorable WILLIAM H. SAWTELLE, District Judge, presiding.

(Minute Entry—April 18th, 1921.)

L-85—(PRESCOTT).

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

(Minutes of Court—April 18, 1921—Order Fixing Amount of Supersedeas Bond.)

On application of the defendant, IT IS ORDERED that supersedeas bond on writ of error herein be fixed at the sum of Eight Thousand Five Hundred Dollars (\$8,500.00), and that upon the giving of such bond by the defendant, in accordance with the law and the practice and rules of this court, execution of the judgment herein may be stayed pending the determination of this case by the Circuit Court of Appeals. [33]

In the District Court of the United States, in and
for the District of Arizona.

No. L-85—PRESCOTT.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Bill of Exceptions.

The defendant's motion to strike certain portions of plaintiff's complaint having been overruled as to certain parties, especially those portions relating to the pleading of special damages as an issue, and defendant's demurrers having been overruled, and exceptions to said rulings having been made and allowed; afterwards, to wit, on November twenty-sixth, 1920, at a term of the above court held at Prescott, in the District of Arizona, before his Honor, William H. Sawtelle, District Judge, the cause came on to be tried by jury, plaintiff being represented by O'Sullivan & Morgan, and the defendant by Favour & Cornick. Upon trial all witnesses were duly sworn; the plaintiff called as a witness John T. Littlejohn, who testified as follows:

Testimony of John T. Littlejohn, for Plaintiff.

I was born in Ohio; am fifty-seven years old; am married; have been living in Arizona about nine years and in Cottonwood, Arizona, about three

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(Testimony of John T. Littlejohn.)

years. I started working for the United Verde Extension Mining Company about three years [34] ago, first on construction of their Smelter Plant. On June second, 1920, I was working in the bull gang under Mr. Wright as foreman; had been working in this gang since the smelter was started on August first, 1919. I did all kinds of work, around the yards and the general office, cleaning up, moving machinery, unloading cars, drilling concrete, swinging a jack-hammer, installing machinery—anything like that as ordered by the boss. The smelter plant consists of the smelter, sample-mill, machine-shops and all those works. There were about nine men in the gang and a few days prior to June second, 1920, I was leveling up gravel and such stuff around the general office there. I had drilled out the whole end of the sample-mill about a month before; we had to run concrete in for putting up the rolls. This concrete construction was an addition to the sample-mill. The sample-mill was used to crush ore for the smelter and the crushers operate with motor-power. I had not been working there the day before, but on June second five of us were taken over to the sample-mill and we jacked up the rolls; Wright then told Clark and Stoven to go below and put the tops on the bolts that go through the concrete to hold it, and told me and the other boys to put in the bolts. I grabbed a bolt and went on the staging and the plank cracked and I didn't know any more until I was getting into the car, helped by two men, to

(Testimony of John T. Littlejohn.)

go to the hospital. The bolt was about four feet long and two inches in diameter. I don't remember falling; I would not say I fell because I do not know. The concrete pit was about ten feet wide and ten feet deep where the boards crossed it; it was built as a conveyor to run ore from the rolls into the sample-mill, that was why the end of the mill was cut out. I had to walk on the planks across the aisle to put in the bolt. There were three planks, side by side, twelve feet by one foot by two (2) [35] inches. I held the bolt up, the plank broke and I lost consciousness until I was being put in the automobile to be taken to the company hospital. Dr. Moore dressed my head there. "My skull was broke there in front," over the left eye; the back of my neck and of my head is sore; there is a lump on my skull and my nerves is gone; my head aches and my neck hurts ever since. I never had headache or backache or bad nerves before. There was a big knot in front near as big as the end of my thumb, which hurt all the time; I couldn't wear my hat only just back. Three months from the time Dr. Moore told me I could go back to work the knot broke and three little slivers of bone the size of the end of a small pen came out. Then my head got better in front; the back of my head still hurt. The back of my head is crushed, I guess; there is a raised place in the skull.

MR. O'SULLIVAN.—(To Jury.) "Feel this man's head, Gentlemen."

THE COURT.—"If any of the jurors desire to

(Testimony of John T. Littlejohn.)

make a personal inspection you may do so."

After having my head dressed at the hospital I went home, about a mile away, and went back to the hospital every day for fourteen days, when Dr. Moore pronounced me well enough to go to work. I still went to the hospital to have my head treated. My neck, head and shoulders hurt me the whole time; I thought I had an inward rupture, as it hurt me down in the groin when I lifted anything; but I gave that up, as being the cords from my head, I guess. I went back to work by permission of the doctor and was kept at light work as near as the boss could for seventeen days and five hours.

PLAINTIFF'S ATTORNEY.—"And why didn't you work longer?" A. "They laid me off." (3) [36]

DEFENDANT'S ATTORNEY.—"We desire to enter an objection to that on the ground that was one of the matters stricken from the complaint and it is not proper for counsel to refer to that. It is absolutely immaterial in this case."

PLAINTIFF'S ATTORNEY.—"We have a right to show . . .

COURT.—"I don't know that it was by reason of his being physically incapacitated. I think it goes to that."

DEFENDANT'S ATTORNEY.—"Unless he shows that point, I think the conclusion of the witness is not to be taken."

COURT.—"He may state whether or not he was able to continue at work."

(Testimony of John T. Littlejohn.)

I quit by request and got my time; "I suppose because I wasn't able to do the work."

DEFENDANT'S ATTORNEY.—"I move that that be stricken out."

The COURT.—"No, if he don't know positively, don't state an opinion, that may be stricken."

The WITNESS.—"Well, I can tell what was said to me by the authorities if that will do any good."

The COURT.—"Well, you may tell that."

The WITNESS.—"The timekeeper—Mr. Wright told me that the timekeeper wanted to see me, so I goes to the office and went in and he said he had orders to lay me off till I felt able to sign the release. He says, 'I will give you this check and that will be all.' That was the check for my half month's work, for the fifteen days, and he give me that check, and he says, 'That will be all.' Then I taken the matter up with the claim agent, Mr. Johnson. Well, he first ignored me when I went (4) [37] up there, and said, 'I cannot do anything for you. Dr. Moore pronounced you all O. K.' I said, 'I cannot help what Dr. Moore pronounced me, my head and neck hurts me worse now than it did at first.' He said, 'You go back to Dr. Moore and let him examine you, and unless he says you are all right you come back here again.' After he said he couldn't do anything for me he turned around and said that. Well, I goes back and seen Dr. Moore again. He examined me again. Mr. Moore said as far as he is concerned himself he

(Testimony of John T. Littlejohn.)

pronounced me sound, and I went back home. The next pay-day after that Dr. Moore and Mr. Thompson, the claim agent, came out to my place, and Mr. Thompson suggested that I should go up to the Verde and be examined by that gentleman sitting right there—I have forgotten his name—regardless of Dr. Moore. I told him all right. He said he would take me up and back. I said, ‘All right.’ I wasn’t contrary; I didn’t want to be; I didn’t care whether they were company’s doctors; so I went up there. That doctor proposed that I should go to Jerome next day and have an X-ray picture taken, then he would make a thorough examination of me; so I went, according to that, and they taken the X-ray pictures, and I went in and he give me a thorough examination. Then Mr. Thompson walked over to me after the doctor got through examining me, and he said, ‘Littlejohn,’ he says, ‘I don’t want you to think that we ain’t to do—that I ain’t going to do fair with you. I have no other orders only to treat the men fair.’ He says, ‘Mr. Kingdon gives me orders to treat his men all fair. They have them all insured and just as soon as ever those pictures are developed I will go down and try to settle up with you, and I don’t want you to think’—

Mr. FAVOUR.—“I object to this. We don’t want to prolong this trial. This is kind of a garrulous statement of gossip (5) [38] of what took place and has no bearing on the case. We don’t want to keep objecting, but I do object to this long

(Testimony of John T. Littlejohn.)

statement of matters that are highly prejudicial and have no bearing on the case, and I ask that the witness be questioned as to the issues involved here."

The COURT.—"Any conversation with reference to settlement would not be admissible."

The WITNESS.—"I just had one or two more words and I would have been through."

Mr. FAVOUR.—"May I ask that that be stricken out, that statement?"

The COURT.—"No, it wasn't objected to; it may stand."

Mr. FAVOUR.—"Well, I ask particularly that the matters concerning that the company is insured, be stricken out."

The COURT.—"No, I deny the motion."

Mr. FAVOUR.—"Note an exception to that, please."

The COURT.—"The reason for the denial is, that there was no objection to it until after it was all stated."

Mr. FAVOUR.—"I couldn't object to that, it wasn't in response to any question. I don't know what is in this witness' mind. If he starts answering a question and rambles off and makes a statement prejudicial to the defendant—"

The COURT.—"Well, you heard him when he started to ramble and didn't make any objection."

Mr. FAVOUR.—"I ask now that it be stricken out."

The COURT.—"Well, I deny the motion."

(Testimony of John T. Littlejohn.)

Mr. O'SULLIVAN.—Q. “Now, Mr. Littlejohn, what did Mr. Johnson, the claim agent of the company, say as to why you were laid off?”

Mr. FAVOUR.—“I object to that, if your Honor pleases.” (6) [39]

The COURT.—“The objection is sustained as not going to prove any issue in the case. I will let stand anything that has been said without objection, but I will not let anything more be said over an objection.”

Mr. FAVOUR.—“We make the further objection that Mr. Johnson, who made that statement is now dead, and therefore any statement he made to the witness would not be admitted, unless there was an admission of some kind.”

The COURT.—“I didn't know that at the time his name was mentioned, before the witness got through with his testimony and no objection was made.”

Mr. FAVOUR.—“I just mention that.”

The COURT.—“You may have that as one of the grounds of the objection.”

I suffer with the back of my head and neck, have had headache every day, cannot turn my neck around any further than (indicating) or back; it hurts when I do it. My shoulders and my back hurts once in a while. I never had head or backache before. I have not worked except the seventeen days. I wasn't able to get out and hunt me a job; there was no light work I could get around there. I wasn't able to pitch hay and wouldn't

(Testimony of John T. Littlejohn.)

undertake it. I could not do clerical work.

Since the injury I have slept good some nights and not at all, others. I never had insomnia before. I am nervous, my hands and legs tremble, which I never did before. I lost fourteen pounds the fifteen days I was off.

Eight stitches were put in my head. I had good health all my life. I was earning \$4.60 a day at the time of the accident. I have not earned any money since, except the seventeen days. I had no idea the plank would break when I walked on it. (7) [40]

Cross-examination of JOHN T. LITTLEJOHN.

The defendant then requested an examination by its physicians of plaintiff's head, as it had been exhibited to the jury.

The defendant also requested an examination of plaintiff's physical condition generally because it had been placed in evidence, which was objected to by plaintiff's counsel.

The COURT.—“Well, plaintiff having objected to submitting himself to examination by two disinterested physicians to be appointed by the Court, the objection is sustained.”

(Exception by defendant.)

My trade is laboring man; I have worked around ore furnaces and farmed. For the seventeen days I did the same kind of work as before, only it was the light work.

(Noon recess.)

The defendant's counsel thereupon moved the

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(Testimony of John T. Littlejohn.)

Court to declare a mistrial on account of the statement of plaintiff that Mr. Thompson told him, "they have them all insured" (quoted in full above); on the ground that said statement was prejudicial and could not be corrected by striking the evidence, (the evidence not having been excluded or stricken by the Court). Motion overruled and exception taken.

The concrete pit was under construction; it was on the outside of the sample-mill and an addition was being made to it; it was not under ~~the~~ roof at that time.

I walked out on the plank; there were two men standing on it who fell at the same time. Dr. Moore said the injury was to the skull; Dr. Thigpen, another company doctor, told me it was fractured. I knew it was fractured when them bones came out. They worked out themselves; three-cornered bones, flat. My head, neck and shoulders hurt me most of the time. The pain in (8) [41] the groin is gone. My nerves are worse since I stopped work. I talked my condition with my family of course. Never had a doctor but once in my life before. I got over the bruise on my leg. I haven't tried to get a job; carried a little water once in a while helping around the house.

Testimony of Dr. J. B. McNally, for Plaintiff.

Qualifications admitted. I made an examination of Littlejohn in my office in early September and later in that month. I found him suffering from

(Testimony of Dr. J. B. McNally.)

an ulcerated injury to his forehead, the first time. From the history he gave, with what I could see, I concluded there was something behind the surface that caused it not to heal, some irritation; also I found a depression on the left side of his head in the posterior region, which was not sore; also noticed a fine or muscular tremor all over his body; his neck muscles were apparently very tender, slightly rigid where attached to the bone. I was not able to account for the tremor; he told me it had followed the injury and I concluded there was probably a concussion of the brain or some part thereof that may have set up the tremor. I examined him again within the last week; his general condition was about the same; of course his head was healed and he gave me the history of taking out the little bones. His nervous condition was very slightly exaggerated, I think. He complained of not being able to sleep, headache and tenderness in back of head and neck.

Cross-examination of Dr. J. B. McNALLY.

I went into his history carefully. He told me about his health and his injury. He came for examination, not for treatment, and he didn't ask to be treated. I gave him medicine to help him sleep once. This infected area on the forehead (9) [42] had entirely healed when he came the last time. I told him, the first time, I thought the bone was injured some. I did not know there were fragments of bone detached; the bone could be injured without fragments detached. That would

(Testimony of Dr. J. B. McNally.)

not in itself be a serious injury. It might or might not have produced trouble deeper seated. The little detached particles from the outer plate were what kept it sore so long. The depression on the left of the head was slight, with no appearance of soreness. Sometimes such depressions are congenital. I could not say whether it was a result of the fall; if it were not sore during the first two weeks I would say it was not the result of the fall. I think there was a concussion there. A concussion is a jarring of the brain with a disturbance of the cells. It takes place to some degree, I believe, when one is knocked senseless. It is not always attended by serious results. You can have a concussion with, and without, a concurring fracture of the skull.

I made no X-rays. I don't think this injury caused any fracture of the inner table of the skull, no projecting in toward the brain substance. I made tests of his nervous condition and found the general tremor, which is only a symptom and not a disease; you may have it with many diseases.

WITNESS.—“Well, I believe the cells of the brain were disarranged and their function, physiological function, was disturbed.”

DEFENDANT'S ATTORNEY.—“And that, you say, will continue, or won't it clear up?”

WITNESS.—“I think it will continue in a man of his age.”

You don't see much of it (tremor) in men of fifty-seven years. It would be better if he were

(Testimony of Dr. J. B. McNally.)

under observation (10) [43] of a physician, than talking over his condition in his family. He didn't tell me whether he was under care of a physician at the time he was examined by me.

He might or might not have been rendered unconscious at the time of the fall, to produce the condition I found; concussion is usually accompanied by unconsciousness and vomiting, but not always. I think there would have been a dilation of his eye pupils. A great majority of concussions clear up.

His mind appeared perfectly normal for a man of his education, and there was no trouble with his organic body, heart, lungs, etc. It was just the shock to his nervous system. Q. "Won't that clear up?" A. "That I cannot tell." Q. "Wouldn't you say, in your opinion, it will clear up?" A. "I wouldn't say at his age, that tremor." It is not usual for people at his age to have a tremor, but it isn't unusual for people ten years older.

The tremor could be due to any one of many causes, such as worry, malaria, alcoholism; we have hysterical tremor and paralysis agitans, peculiar to the aged. My diagnosis was based on his statements to me and the injury and what he told me.

Testimony of Frank Clark, for Plaintiff.

I have lived in Cottonwood for over a year, know Mr. Littlejohn, was employed by the United Verde Extension Mining Company on June second, 1920.

(Testimony of Frank Clark.)

I was on the bull gang. I was there when the accident occurred. The foreman said to put in the bolts to anchor the concrete forms. Stoven and I went down beneath. I heard the plank break, saw a man hanging, he was pulled up from above. Some man said, "Are you hurt, John?" Littlejohn didn't answer. He was on his back. I took the bolt off his feet. They (11) [44] took him out into the car. I heard the break but did not hear any fall. The pit was nine or ten feet deep. The bolt, I have no idea, weighed forty to sixty pounds. I worked in the gang with Littlejohn over six months and he seemed to be able to keep up his part of the work. I have seen him several times since the accident. The planks were two by twelve, they call them.

Testimony of Robert E. Lee, for Plaintiff.

I live at Clemenceau. Have known Littlejohn about three years. I was driving the team, under orders of Mr. Wright, working for the company at the time of the accident. I saw a part of it. I was standing up pretty close; they were just fixing to put these bolts in when I drove up. I picked up a bolt and walked in and stood with one foot on the plank and the other on the form. I couldn't tell who walked out or stepped on the plank, but it broke and away he went. I fell backwards and any across the plank. I didn't fall into the pit. I don't remember seeing Littlejohn on the plank. I saw him being led up, then I went

(Testimony of Robert E. Lee.)

out to the team. There were two or three planks, two by twelves, about fourteen feet long. The pit was ten feet wide and nine or ten feet deep.

Cross-examination of ROBERT E. LEE.

I saw them come on top, just to the last step up to the level. Mr. Littlejohn was walking.

Redirect Examination of ROBERT E. LEE.

Littlejohn was between two men.

The COURT.—I find from an examination of the reporter's notes here that this witness, the plaintiff, made a statement to which counsel for defendant objected, in reply to a question or permission of the Court, and therefore, not having (12) [45] been asked for by counsel on either side and not being responsive to the subject he was discussing at the time he was given permission by the Court to proceed with his statement, I think there are certain portions of this that I shall strike out. He proceeded to tell what Mr. Thompson—well, first the witness said, "I can tell what was said to me by the authorities if that would do any good," and the Court said, "You may tell that." I supposed he had reference to whether he—to the matter of his being able to work, and he went ahead to say what Mr. Thompson told him and what the doctor told him and then he proceeded to make a statement which neither the Court nor counsel on either side could have anticipated, and therefore I exclude this portion of his testimony entirely, "Then Mr. Thompson walked over to me after the doctor got through examining me and said, 'Little-

(Testimony of Robert E. Lee.)

john, I don't want you to think that we ain't—that I ain't going to do fair with you. I have no other orders only to treat the men fair.' He says, 'Mr. Kingdon gives me orders to treat the men all fair. They have them all insured and just as soon as ever those pictures are developed I will go down and try to settle up with you, and I don't want you to think'—and then he was stopped. Now all that I exclude because in the first place any discussion by itself with the expectation of the efforts to make a satisfactory and mutual arrangement for settlement is never admissible in the trial of a law suit. People have a right to settle their differences and to make their peace and to avoid litigation, and any statement made by either party while that is in progress is never admissible in a law suit and is no admission of fault or liability on the part of either, and the question as to whether these men were insured is wholly immaterial in this case. You can readily see why that (13) [46] might be so. In the first place, it might be a case where the insurance could never be collected, the insurance company might be insolvent or they might refuse to pay, many reasons why that is not admissible, and therefore plaintiff's statement which was not called for by counsel on either side, and I didn't anticipate it when I permitted him to make a statement with reference to his physical condition, therefore you will not consider it at all for any purpose. Make up your verdict wholly independent of that statement."

Testimony of Harry Garrison, for Plaintiff.

I have lived in Cottonwood a little over three years; am in the auto service station business; have known Littlejohn since 1913. On June second I heard Mr. Littlejohn was hurt and being an old friend of his, I naturally went to see him. I went to his house; he was in bed all bandaged up and seemed to be very nervous. The next day I took him up to the hospital in an automobile and the doctor dressed his wounds. I sat in the other room with the door open. I saw a red patch on his head. I saw Littlejohn every two or three days between then and now; he is apparently a changed man from what he was before, physically and mentally. He has been around my shop when I was working and when I asked him to hand me a tool he would miss it and grab around before he got it, shaking all the time. I drove him into Prescott a few days ago to attend the trial. Something happened from which I could tell the jury about his physical condition. (Objection made by defendant to any testimony thereof as remote. The plaintiff then avowed he expected to prove Littlejohn tried to pump air into a tire and couldn't do it. Objection sustained and jury instructed to disregard that evidence.) During the three years I knew Littlejohn previous to this accident, "He was apparently healthy and sound." (14) [47]

Mr. CORNICK.—"We object to that, your Honor, that it is a conclusion beyond the ability of this witness."

(Testimony of Harry Garrison.)

Mr. FAVOUR.—“It is quite apparent he is hardly in a position to pass on this man. He is a friend. He hasn’t seen him when he was working, he certainly hasn’t seen him in the evening, and he says occasionally, and he is unqualified to pass on that. It is rather with reluctance that the Courts are allowed to pass on the impression whether the man is sound or unsound, but the courts have let that go in because that is a matter of common repute. When you get down to the physical condition of a man you get down to a hundred and one different elements that even a man skilled in medicine has difficulty in determining.”

The COURT.—“I think the witness’ statement that he had the appearance of a healthy man may stand and the other portion of his answer, that he was sound—no, I think a witness may state that a man has a healthy appearance. I think that is an opinion that a layman may give. As to whether he is physically sound, that is an opinion that he may not express.”

Mr. FAVOUR.—“Note an exception.”

The COURT.—“Very well, you may have an exception.”

I never saw Littlejohn at work. His nervousness and shaking before the injury were not noticeable.

Testimony of Sarah Littlejohn, for Plaintiff.

I am the wife of plaintiff; married thirty years ago; we have lived in Arizona, I guess, about three

(Testimony of Sarah Littlejohn.)

years, near Cottonwood about one mile from the United Verde Extension Smelter. He worked for the company. On June second, 1920, I saw Mr. Littlejohn when he was getting out of the car about noon (15) [48] in front of our gate. Mr. Newton was the only one with him. Mr. Littlejohn stepped out with his dinner-pail in his hand, his head bandaged, one eye standing up, and his face bloodshot. He was very nervous and shaky and I helped him into the house and put him to bed. He looked like a dead man. His left eye stood open and never closed when he went to sleep. There was a big lump on the back of his head; his left leg was black and blood shotten to his heel. He went to see the doctor every morning for dressing his wound, and one morning the bandage came off and I saw the place on his head and it was red and running. The doctoring kept up several days. I took care of him.

“Q. Did he manifest any signs of pain?”

DEFENDANT’S ATTORNEY.—“We object to that as leading and suggestive.”

(Overruled.)

“A. Yes, sir.”

DEFENDANT’S ATTORNEY.—“Note an exception to this line of testimony.”

The COURT.—“Yes.”

PLAINTIFF’S ATTORNEY.—“Please tell the jury what you noticed by way of your husband’s manifestations of pain after his injury.”

“A. Well, he was restless of a night and when he

(Testimony of Sarah Littlejohn.)

was sleeping he moaned in his sleep.” He has not been working since his injury. I have observed a nervous condition; he is restless at night, gets up and walks the floor and puts his hand to his head. His hand shakes; he cannot get his coffee to his mouth without shaking.

Since we have been here, a few nights ago, something out of the ordinary occurred. (16) [49]

PLAINTIFF’S ATTORNEY.—“Well, what happened?”

DEFENDANT’S ATTORNEY.—“We object, your Honor, unless it is connected up.”

The COURT.—“You affirm you propose to show it has something to do with the injury?”

PLAINTIFF’S ATTORNEY.—“With his physical condition, yes, your Honor.”

The COURT.—“Overrule the objection.”

A. “Well, he was restless, he couldn’t sleep; he walked the floor as he did before, holding his neck, his hands on the back of his head. I was restless, too. I said, ‘Why can’t you sleep?’”

Before this injury and for thirty years he did all kinds of heavy work, farming; he was generally a hard-working man; never sick or nervous or sleepless and worked continuously. Since this injury he has helped around the house at times, carrying in water, and looking up a little stove wood, but not all the time.

PLAINTIFF’S ATTORNEY.—“Why?”

DEFENDANT’S ATTORNEY.—“We object.”
(Overruled.)

(Testimony of Sarah Littlejohn.)

A. "Well, he was suffering pain."

DEFENDANT'S ATTORNEY.—"We object to that and ask that it be stricken."

The COURT.—"Overruled. Well, I will sustain that; I will sustain the objection and let her state—well, I hate to make so many suggestions. I will just sustain the objection.

Cross-examination of SARAH LITTLEJOHN.

Mr. Littlejohn was a farmer when we were married in Ohio and in coal mines in winter for about twenty years. When he came to Phoenix he worked on a farm, on putting up poles for electric line, cleaning streets, on buildings, wheeling concrete, (18) [50] always doing heavy work. We haven't talked much about this lawsuit; he speaks to me about it, wishes it was settled. He had a doctor once in Ohio; he had symptoms of malaria. He had no doctors since the injury except the company doctors and Dr. McNally.

Thereupon plaintiff offered in evidence the American Mortality Tables showing the expectancy of life.

Mr. CORNICK.—"We object, your Honor, for several reasons. In the first place, we object because those mortality tables are based in this computation upon the average man, following the average walks of life. This plaintiff has not brought himself within the character of persons upon whom those mortality tables are based. In the second place, because the plaintiff has not located himself within the character of persons from whom the

mortality tables are taken; in other words, he has not shown anything upon which there may be drawn any conclusion as to whether he is one of that character, and if so, as within what class of those general individuals from whom that table is taken he would fall, so that there would be no method of application of those tables. In the third place, because there is no evidence in the record which brings the plaintiff within the application of the mortality tables. In other words, there is no evidence of permanent injury, there is no evidence of the degree of injury, so that there could be no application of these tables to the condition of the plaintiff as shown.”

The COURT.—“Well, I should charge the jury that unless they believe that the injuries testified to, or some of them, are permanent injuries, then the mortality tables would have no effect whatever, and I should also state the class of persons of whom that table is made or from whom it is made, and ask them to find in the first place whether or not he comes within that class, and, if so, then they may consider the table.” (19) [51]

Mr. CORNICK.—“In the fourth place, for the fourth ground for their exclusion, that the plaintiff is shown to have performed labor and shown to have been capable of the performance of labor since the happening of the accident, so that there is no evidence upon which the jury could classify him or make any application of the tables to his injury.”

The COURT.—“Very well, they will be admitted,

under proper instructions of the Court to the jury as to their weight."

Mr. FAVOUR.—"We desire to note an exception."

The COURT.—"Very well. Well, the expectancy of a man 57, I think that is his age, is how much?"

Mr. MORGAN.—The American-Mortality tables, 16 and 5/100 years.

The COURT.—"All right."

Mr. CORNICK.—"To which, of course, we are objecting."

The COURT.—"Yes."

Mr. CORNICK.—"And note an exception."

The COURT.—"You may have an exception."

Thereupon the defendant's attorney requested a physical examination.

Mr. FAVOUR.—"We desire time to have that examination by our physician of the plaintiff, and desire the direction of the Court as to what length he may go to in that examination.

The COURT.—"In the absence of an authority on the subject, I think I will be compelled on objection of the plaintiff to restrict the examination to that portion of the body which was submitted by the plaintiff to inspection." (20) [52]

Mr. CORNICK.—"We ask leave, in making the examination of the head of the plaintiff, which was submitted to the jury, to make such examination in addition as may be necessary to determine what effect, if any, upon the condition complained of in

this case those conditions of the skull or of the head would have."

The COURT.—"In other words, you think that an X-ray should be made?"

Mr. CORNICK.—"No, I think, your Honor, that the conditions of the head of themselves, especially, coupled with the allegations of the complaint and the proof introduced might—an examination limited to the skull might show nothing, but if an examination of the conditions which are alleged to be the result of those conditions is not made, we have no opportunity to rebut that evidence."

The COURT.—"What do you desire to do?"

Mr. CORNICK.—"We desire to examine the plaintiff in so far as the condition of his head may make it necessary in order to show what the result of that alleged injury was."

The COURT.—"I still do not understand what you want to do. How do you want to examine him?"

Mr. CORNICK.—"We want to examine his head first; then if it is found necessary to examine the state of his nerve to tell the condition of his head, then we desire to examine his nerve."

The COURT.—"Well, it wouldn't affect any injury to the head, the injury to the head might affect the nerve."

Mr. CORNICK.—"Yes, and we want to find out if the condition of the head probably caused the other condition complained of." (21) [53]

The COURT.—"Well, I am no physician. I

cannot dictate how they should examine him. They may examine his head for all purposes, but I don't believe that I have any legal authority to require him to submit that portion of his body to examination which he himself did not deem proper to submit."

Mr. CORNICK.—"Now, the shaking of his hand, your Honor, may we not have the right to examine him?"

The COURT.—"Why, you on cross-examination, could ask him to hold out his hand so that the physician could see that."

Mr. CORNICK.—"Well, he claims that condition is due to the injuries to his head."

The COURT.—"Well, examine his head, then."

Mr. CORNICK.—"In other words, your Honor, I do not make myself clear, I am sure. We desire to examine such portions of his body—"

The COURT.—"I understand you now clearly. You want to examine his whole body, if necessary?"

Mr. CORNICK.—"If necessary."

The COURT.—"Well, I haven't any authority to grant that permission. He is the only man that can, and he denies that authority through his counsel, so you are confined to an examination of those portions of his body which he exhibited."

Mr. CORNICK.—"We except to that ruling of the Court, if your Honor please."

Thereupon a short recess was taken.

The COURT.—"Have you completed your examination, Gentlemen?"

(Testimony of G. S. Purtyman.)

DEFENDANT'S ATTORNEY.—“We have examined as far as the head alone, your Honor.” (22)
[54]

DEFENDANT'S CASE.

Testimony of G. S. Purtyman, for Defendant.

I was employed on June second in the bull gang working on this concrete pit. The pit was seven and one-half to eight and one-half feet deep and between ten and eleven feet wide. I was on the plank when Mr. Littlejohn stepped on it. I was on the plank with him when it broke. I threw myself back and caught on the other board. I got a scalp wound and bruised leg. I looked down and saw the plaintiff walking between two men out of the pit. I got into the car, too, and went to the hospital and was in the room when his wounds were dressed. He walked into the hospital assisted by Mr. Wright and talked some. This pit was outside the sample-mill, at the end of the building. There was no power there. We were working on the construction, putting up the rolls. The planks were put across so we could work back and forth across the pit.

Testimony of Dr. James R. Moore, for Defendant.

Defendant's attorney stated purpose to examine witness as the physician who examined plaintiff after the accident and down to July twenty-second.

PLAINTIFF'S ATTORNEY.—“No objection at all.”

(Testimony of Dr. James R. Moore.)

I am admitted to practice as a physician in Arizona. I am a graduate physician of the University of Southern California; have practiced since 1916; about a year in Cananea, Mexico, three months with the city of Cleveland, Ohio, sixteen months in the United States Army and since August, a year ago with the United Verde Extension Mining Company. I treated the plaintiff for an injury on June second, 1920. Plaintiff came in that morning with Mr. Purtyman and Mr. Wright. Plaintiff had a cut on the left side of forehead, several scratches and bruises above left side of face, left elbow bruised, also left leg above knee. A nurse was helping me clean up the injuries of the two men. The forehead wound was thoroughly cleaned and sutured or sewed up. This cut was about one to one and one-half inches long, Y-shaped, (23) [55] extending down to the covering of the bone of the skull, narrowing so that the rent in the skull covering was not over three-fourths of an inch. Plaintiff was conscious and talked, no anesthetic was given. He answered my questions rationally and I did not feel called upon to go further into his mental condition. He showed no signs of vomiting. I examined his eye pupils, as we always do in head injuries, and there was no abnormality. I looked for other injuries, and found none except as I have described. He did not complain of injury to the back of his head, that I recall. I dressed the wound for him on succeeding days. His condition showed such progress that on June fifteenth I gave him a

(Testimony of Dr. James R. Moore.)

card to go to work. The cut had practically healed except for a slight amount of oozing. All other scratches had healed and he made no complaint about his leg. He was to return for dressing and I think he did so for two or three times. The last time I told him that it was practically healed. About two weeks later he returned and I examined him; he complained of some pain in the back of his head. The head scar was healed and apparently in healthy condition. I examined the rest of his head and found nothing unusual. I found no stiffness or rigidity of his head and neck; he complained of pain when I was bringing out these points. Later we had X-rays made by the United Verde Copper Company hospital; two of them are in the courtroom, I believe. We took them, because he complained of his neck and head, to see if there was any condition we might not have found. I have an ordinary knowledge of X-ray plates. (24) [56]

DEFENDANT'S ATTORNEY.—“From your examination, from your experience, what do they show for you?”

PLAINTIFF'S ATTORNEY.—“We object to that. If the plates were taken they speak for themselves.”

The COURT.—“The plates are the best evidence.”

DEFENDANT'S ATTORNEY.—“Yes.”

I had no occasion to change my previous opinion by reason of these plates. The brain consists of nerve tissue and it is contained in the skull which

(Testimony of Dr. James R. Moore.)

is a bony covering consisting of two layers, two dense outer layers, and a spongy mid-portion. Fractures of the skull owe their importance to their effect upon the brain. The symptoms which make themselves manifest in cases of fracture of the skull are those of pressure within the skull. One is unconsciousness, with increasing pressure, vomiting and headache. There is frequently a difference in the size of the pupils of the two eyes. If there is splintering of the bone on the inside of the skull, there will be pressure on the surface of the brain, probably followed by paralysis, or it may be irritating only and cause increased activity. There may be a blood lesion there followed by other symptoms. If Mr. Littlejohn had sustained a fracture, and it had been a simple fracture he might be presumed to have no symptoms whatever, referable to pressure within the skull. People often have their skulls fractured with no harmful results whatever unless there is a splintering of the inner table or a pouring out of blood, causing an increase of pressure within the skull. Knowing Mr. Littlejohn, as I do, and having treated him, I consider that he has laid undue emphasis upon the importance of the injuries and possible consequences which might come from them and he is probably worrying more over his condition than the extent of these injuries would warrant. I (25) [57] do not believe there will be any permanent disability result from his injury.

(Testimony of Dr. James R. Moore.)

Cross-examination of Dr. JAMES R. MOORE.

I am thirty years old. I am still employed by the United Verde Extension Mining Company. I examined Mr. Littlejohn's head here in the courtroom and did not take his pulse; and found an irregularity in the back of the head on the left side. There were two X-rays taken of the skull, one from before backwards and one from side to side and one of the neck. The entire skull was included in both X-rays. I made no special examination of Mr. Littlejohn for any mental disturbance. The wound was healed up about a month after the accident. There was no infection then. If there were detached bones in the wound it would probably cause the wound to open again. There would be a sore which would continue until the bones came out. Not all fractures would show in an X-ray. I couldn't say that a great many fractures would not show in X-rays. I had not examined Mr. Littlejohn since the last X-rays were taken until I examined him in the courtroom, when I made as full an examination of his skull as circumstances would permit.

Redirect Examination of Dr. JAMES R. MOORE.

The skull is subject to irregularities which are not the same in any two individuals, and in my opinion the irregularity in Mr. Littlejohn's skull is congenital or a natural disfiguration. I do not believe it would be possible for a man to suffer such a depression from an accident and not suffer any immediate ills or ill effects therefrom. He would

(Testimony of Dr. James R. Moore.)

have known if he had received an injury sufficient to cause such a depression. I think this depression is a normal contour of the skull. He was born that way. (26) [58]

Recross-examination of Dr. JAMES R. MOORE.

In an injury by countrecoup it is supposed that a blow in one portion of the skull may cause a fracture at a distant portion or on the opposite side of the skull. While it is admitted in theory it is very rare in practice.

Redirect Examination of Dr. JAMES R. MOORE.

I did not find any such condition in this man.

Testimony of Robert E. Lee, for Defendant.

I have known Mr. Littlejohn for three years. He has always talked loud and quick and through his nose. I have not paid any attention as to whether there is any change in his voice.

Testimony of Dr. R. H. Thigpen, for Defendant.

Qualifications admitted by plaintiff. I have been a practicing physician since 1904. I was practicing in Jerome during the summer of 1920, as surgeon in charge of the medical department. I examined Mr. Littlejohn in my office in the Shea Building in the presence of Dr. James Moore. I found a subject who in my opinion was a case of premature senility who had a recent injury. I based my opinion on the fact that his temporal arteries were tortuous and that his brachial arteries were plainly visible. He had, in each eye, a well-developed senile white ring and he had the in-

(Testimony of Dr. R. H. Thigpen.)

tention tremor of senility. When he held his hands out to you and had his attention called to them there was quite a tremor. When at rest there was no tremor. His voice was unsteady, peculiar, broken, which you noticed in his testimony. The pulse pressure, blood pressure (27) [59] was slightly increased over normal. I found a scar, Y-shaped, over the left eye. Between these two diverging limbs was a small hard, slight elevation which felt not unlike a bony ridge. The scar was quite inactive and there was no inflammation. The patient complained of tenderness around the scar. He mentioned that he had been unable to pull his hat down over the scar and stated that the shoulder-neck group of muscles were tender under pressure. I moved his head in all directions. It moved freely and I did not detect or was unable to demonstrate any rigidity or stiffness of the muscles. His nervous reflexes, the knee jerk reflex was normal. He had no Babinsky sign. That is in striking the bottom of the feet his big toes did not turn up instead of down. In having him stand with his feet close together and his eyes closed he swayed considerably and apparently would have fallen had he not been supported and with his eyes closed in asking him to bring his finger-tip to the point of his nose, his muscular co-ordination was not good. That seemed to me to be in line with his other symptoms of premature senility. I had some X-ray plates made. Something went wrong in the development of the first exposure and another was taken. I sent them

(Testimony of Dr. R. H. Thigpen.)

to Dr. W. W. Watkins. They showed the forehead where the scar was located. Dr. Watkins is a Roentgenologist and devotes practically all of his time to the study of X-rays. From the results of these pictures I had no cause to change my previous diagnosis. These pictures were made at the United Verde Copper Company hospital by Dr. Kaull. I examined Mr. Littlejohn's head in the courtroom this afternoon in a superficial manner. I found the scar I examined on July twenty-second and that the little bony ridge had disappeared. I found what might, with some stretch of imagination, be termed a depression or irregularity along about the point of union of the parietal bone with the occipital bone on the left. In my (28) [60] opinion it is simply the union of this parietal bone and this occipital bone. They suture together like a saw-union and it is possible for that to be depressed or slightly elevated. It is common in people as the skull is quite elastic. If a child is permitted to lie on one side constantly its head gets flat on that side and bulges on the other. The plaintiff didn't mention any injury to the back of his head when I examined him in July. It is natural that I would have gone over his head and the only abnormality that I made note of was the injury over his eye.

At the time I was observing the plaintiff here in the courtroom he was at rest and I didn't notice his tremor particularly, except when Dr. Southworth asked him to protrude his tongue there was

(Testimony of Dr. R. H. Thigpen.)

practically no tremor of the tongue. Tremor of the tongue occurs frequently in a lesion in the base of the brain. It comes from other causes also. Having observed the plaintiff in the courtroom and having heard all of the testimony, in my opinion it is not possible that the plaintiff's present condition is due solely to the injury he received. A man who is older than his years and running down has a good foundation on which to build some traumatic neurosis for a while, that is especially during litigation. The plaintiff has the well-known litigation symptoms, insomnia, headache, maybe esthesia in one part and phypesethia in another part and he may be ever so honest in that for the time being and find these symptoms quickly alleviated by a favorable verdict. Worry and emotion have a profound effect. Talking is bound to exaggerate such a condition. When I examined the plaintiff on July twenty-second he was able to perform work which he had been doing. Having heard the history of the plaintiff's habits and work or occupation, I will say that hard work, exposure, alcohol, overeating, are the prominent causes of premature (29) [61] senility which may in the plaintiff's case have caused premature senility. I should think that a laboring man of the plaintiff's age would find it depressing to his vitality in general to work in a hot climate after working in a cooler climate.

Cross-examination of Dr. R. H. THIGPEN.

I don't know whether people are sent from all over the world to Phoenix for their health, but it

(Testimony of Dr. R. H. Thigpen.)

has quite a reputation. People under certain conditions go to warmer climates after they advance in years. I came to the conclusion on my examination of July twenty-second that Mr. Littlejohn was prematurely senile. This senility may have come from chronic disease. I think that shock and worry and emotion over a great period of time will tend to produce the element of senility, under proper conditions. In the short time I had to examine Mr. Littlejohn, I did not find any chronic kidney trouble, which may have brought on Mr. Littlejohn's premature senile condition. Mild kidney trouble usually has a tendency to senility. I could not make such a test this side of Phoenix. I did not find any condition of chronic lung trouble which may have brought on the premature senility. I stated I thought he was able on July twenty-second to perform the work he had been doing previous to his injury.

Testimony of Dr. H. T. Southworth, for Defendant.

I am a physician practicing in Prescott. I graduated in Chicago in 1901. I spent one year as an interne in the hospital, practiced one year and a half in Chicago and since have practiced in Prescott, with the exception of twenty-two months spent in the United States Army. I have examined many people with head injuries such as fractures and concussions. I had an opportunity to superficially examine Mr. Littlejohn's head in (30) [62] the courtroom this afternoon and found no indica-

(Testimony of Dr. H. T. Southworth.)

tion that there had been a fracture of the skull. The skull was quite smooth in front and the scar was plainly felt, somewhat of a separation of the sub-broad tissues. Nothing but a local result followed that injury, that is, the soreness following the wound and the time it required to heal up. I heard the plaintiff testify as to a bump or depression on the back of his head. In my opinion, it follows the suture line and the articulation of the occipital and parietal bone, which at birth is open or only partially closed.

If the inner cable of the bone showed as much concavity as the outer contour of the skull showed it was not fractured at the time of the accident on June second. At one time I noticed the plaintiff place a toothpick in his mouth very carefully and take hold of his necktie very carefully. Another time I saw him take a drink of water out of a glass, which are indications that there is not a marked tremor. A tremor is possible on occasions that wouldn't be noticeable on others. There is such a thing as intention tremor, a condition that appears when a patient tries to do a thing and attention is called to it, when not thinking they are comparatively or entirely steady, a tremor develops. Tremor increases with age. A person who has attained much age rarely is able to write as steady a hand as a younger person, particularly if he is a laboring man. The attention tremor is more noticeable with the hand and the tongue. Hard work such as the plaintiff has testified that he has done has a ten-

(Testimony of Dr. H. T. Southworth.)

dency to age all the tissues as well as the nerves, muscles and the bones. Such a life has a strong tendency to harden the arteries and cause arteriosclerosis. This has an effect on the nervous system from the spinal cord to the brain. (31) [63]

It does not affect the brain so much as the blood supply to the brain. I noticed in plaintiff a well-defined arcus senilis or the white rainbow of the clear part or cornea of each eye. It is called the arcus senilis or old age arc. When one gets older that begins to show. When it shows markedly in one of fifty-seven years he is somewhat beyond his years. Mr. Littlejohn's voice shows that he has not the tone of a strong robust man. We have what you might call the piping voice of old age. Knowing what I do I would say that certain temporary physical conditions have resulted from Mr. Littlejohn's injury. His present nervous condition is not wholly attributable to the injury. Mr. Littlejohn could not obtain relief by medical treatment as there is no relief for old age. It could be alleviated somewhat.

Cross-examination of Dr. H. T. SOUTHWORTH.

Mr. Littlejohn's voice is the kind we find with premature senility or motor senility. It is not necessarily a sign but it is one of the signs. I would not draw my conclusion from one sign. I have heard a few young men with piping voices but not many. One of the causes of premature senility in the plaintiff has been his hard work. No, hard

(Testimony of Dr. H. T. Southworth.)

work is not an antidote for old age. A man who remains in an office and doesn't exercise at all is not always liable to become prematurely senile; walking in the fresh air and physical culture are not all bosh. I have not testified that a man should sit down and do nothing to preserve himself from senility and I have not given the jury that impression. Yes, I have heard of Weston, who was about seventy years of age, who walked from San Francisco to New York and return, but that would not cause premature senility, the two situations are not comparable. I was speaking of a man who has for years done very hard work as the plaintiff has testified he has done and (32) [64] not of a man who walked leisurely across the country. No, the United States Government did not train soldiers for three or four months with the hardest kind of work. The United States training was done in moderation. Yes, I took Mr. Littlejohn's pulse a few minutes ago. Once it was 128 and once 134. 72 and 80 is probably the normal pulse; and in a man of his age a normal pulse might be 80 to 90, sitting. No, I would not judge from his pulse alone that he was in a bad condition. He might be nervous from the fact that three doctors were examining him. No, it is not a fact that the injury was the cause of his present pulse and his present condition. Such injuries do not bring on such a condition as he is in now. If he was sick and suffering for a long enough time it would bring on such a condition,

(Testimony of John T. Littlejohn.)

but it wouldn't produce that arcus senilis since July to the present time.

REBUTTAL.

Testimony of John T. Littlejohn, for Plaintiff (In Rebuttal).

I did not have this depression in the back of my head before I was injured on June second of this year.

Cross-examination of JOHN T. LITTLEJOHN.

I know I didn't because I reckon I know how my own head is shaped. I first noticed it when the swelling went down. It was right over the depression.

Testimony of Sarah Littlejohn, for Plaintiff (In Rebuttal).

Yes, I have been married to Mr. Littlejohn for thirty years and have had occasion to examine the back of his head as I cut his hair at one time. He did not have a depression in his head before his accident on June second. (33) [65]

Thereupon, after a recess, defendant moved the Court to direct the jury to return a verdict for defendant, and as grounds assigned the following:

Comes now the defendant at the close of the evidence and before argument of counsel and moves the Court to direct the jury to return a verdict in favor of the defendant, and as grounds assigns:

1. There is no evidence to sustain a verdict for the plaintiff.

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2. The weight of the evidence preponderates in favor of the defendant and against the contention of the plaintiff.

3. This suit is brought under the Employer's Liability Law of Arizona, Chapter VI Title 14, R. S. A. 1913, and there is no evidence of either the plaintiff or the defendant that the plaintiff was engaged at the time of the happening of the alleged accident and injury upon which the suit is founded in any of the occupations declared and determined to be hazardous within the meaning of said law.

4. There is no evidence in the record proving or tending to prove as required by Sec. 3158, R. S. A. 1913, that the accident and injury alleged arose out of and in the course of the employment of the plaintiff and was due to a condition or conditions of such employment, or that the accident and injury alleged were not caused by the negligence of the plaintiff.

5. The evidence shows that the accident could have been avoided by the exercise of care which a reasonable and ordinarily prudent person would have exercised under the same conditions, and the said accident alleged was due to the negligence of the plaintiff. (34) [66]

6. Plaintiff has not introduced evidence to support, and there is no evidence to support the allegations of the complaint that plaintiff was working in defendant's sample-mill, or in any other building or structure where his occupation was hazardous as defined by the law aforesaid.

7. There is no evidence that the alleged accident

was caused by any condition inherent in a hazardous occupation, but the evidence shows that the accident was due to ordinary and avoidable causes in no way conditions of hazardous occupation of any kind.

In the course of argument on said motion, and as shown by the Reporter's notes upon the point urged by defendant that the plaintiff was not shown to be engaged in any occupation declared hazardous within the meaning of the Employer's Liability Law, Section 3156, Paragraphs 1 to 10, at the time of the accident, the Court stated:

“Well, number eight says, ‘All work in and about open pits and open cuts.’ Suppose you strike those out entirely, ‘in and about mines, ore reduction works and smelters.’ Now, it doesn't say he must be handling any dangerous machinery. Any work in and about that smelter is dangerous. The very nature of it makes it so, it doesn't make any difference whether he was a member of the bull gang and was scraping up the ground or sweeping around outside of any dangerous place. If he was sent in, it was his duty to go as sent or directed to go, and if he did go in or about a smelter or in or about a reduction work, why, regardless of whether he was actually all the time engaged in dangerous work, he was engaged in dangerous work when so directed.”

The COURT.—“The motion is overruled. You may have the benefit of an exception.”

DEFENDANT'S ATTORNEY.—“I suppose that covers all these various grounds?”

The COURT.—“Yes.” (35) [67]

Thereupon counsel argued to the jury, and in course of argument of plaintiff's counsel, the following statement by plaintiff and objection by defendant was made:

Mr. O'SULLIVAN.—“ * * * Now, we have asked for ten thousand dollars. You, Gentlemen, know that ten thousand dollars today is not worth as much as five thousand dollars was four or five years ago.”

Mr. CORNICK.—“We desire to object to this line of argument by counsel to the effect that ten thousand dollars to-day is not worth over what four or five thousand dollars was a few years ago.”

The COURT.—“I sustain the objection in so far as it contains a statement of the fact by counsel, because it is not proper to state the fact, but I will permit counsel to argue and to ask the jury to determine whether the purchasing power of a dollar to-day is less than formerly. They may bring to bear their own knowledge and experience in order to determine that. In other words, I think it is the proper matter for them to consider in case they come to the conclusion that the plaintiff is entitled to recover in this action.”

Mr. CORNICK.—“We desire to except to your Honor's ruling.”

THEREUPON the Court instructed the jury as follows:

The COURT.—Gentlemen of the jury, as has been told you by counsel, this is an action brought by the plaintiff against the defendant, United Verde Extension Mining Company, to recover from said de-

defendant damages for alleged or claimed personal injuries which the plaintiff claims he sustained while in the employ of the defendant company. The complaint is rather (36) [68] long and has been read in your presence and hearing, and as it had taken only a day and a half to try this case, I deem it unnecessary that I should again read it. The answer of the defendant has also been read in your presence, in which defendant denies the allegations of the plaintiff's complaint and denies that the plaintiff was injured as alleged, denies all of the allegations of the complaint and says if the plaintiff was injured as he claims or at all, it was by reason of his own negligence.

As I told you—some of you in another case of like character—it is the duty of the Court to instruct you as to the law applicable to the evidence and pleadings, and it is your duty to take the law from the Court. It is your duty, however, to determine what the facts are, as the Court cannot do that for you. You determine the facts, what the facts of the case are, and the Court determines the law. Our functions are entirely separate and independent.

This action is brought under and by virtue of what is known as the Arizona Employer's Liability Law, sometimes referred to as the Employer's Liability Law. Under the provisions of that Act, an employer in certain dangerous occupations, among them working in or about quarries, open pits, open cuts, mines, ore reduction works and smelters, is liable for the personal injuries of an employee by an accident arising out of and in the course of such labor,

service and employment and due to a condition or conditions of such employment or occupation in all cases in which such injuries of such employee shall not have been caused by his own negligence, and in such case the employer is liable even though the employer be wholly free from any fault or negligence. (37) [69]

I charge you, as a matter of law, Gentlemen, that all work in and about mines, ore reduction works and smelters is a hazardous occupation within the meaning of the law. Therefore, if you believe, from a preponderance of the evidence, that the plaintiff, at the time he claims to have been injured was working in and about open pits, open cuts, mines, ore reduction works or smelters, he was at the time engaged in a hazardous occupation and that it comes within the meaning of the Employer's Liability Law.

This being an action based upon the Employer's Liability Law of Arizona, as set forth in Paragraph Six of plaintiff's complaint, it is incumbent upon the plaintiff to allege and prove that he was, at the time of the alleged accident and injuries, engaged in one of the occupations declared and determined to be hazardous within the meaning of said law. The fourth paragraph of plaintiff's complaint alleges that at the time of the alleged accident the plaintiff was in the employ of the defendant and was directed and ordered by said defendant corporation and its foreman in charge of said bull gang, to assist in installing certain equipment in defendant's sample-mill, then and there being a

mill used by the defendant to sample, treat and crush ores, the said sample-mill then and there being a part of said smelter, and ore reduction works and an appurtenance thereto; that plaintiff did thereupon engage in said work as directed, that while plaintiff was assisting in putting in said equipment in said sample-mill, he was then ordered and directed by defendant corporation and its said foreman of said bull gang, to place and install in the frame work of certain rolls or rollers in said sample mill, a large iron bolt or rod, approximately four feet in length, by about two inches in diameter, and weighing approximately one hundred pounds, that plaintiff while then (38) [70] and there in the due course of his said occupation and employment, was then and there ordered and directed by the defendant and its said foreman of said bull gang, to take said iron bolt or rod and go upon a certain platform then and there covering a certain concrete pit about ten feet deep by about the same dimensions in width and length, and then and there situate below said platform and in said sample-mill aforesaid; that plaintiff, as directed, did take said iron bolt or rod in his arm and did proceed to and upon said board platform, for the purpose of placing and installing the same as aforesaid.

I charge you that before plaintiff can recover under the allegations of the complaint, he must prove that he was, at the time of the injury, engaged in one of the occupations declared to be hazardous by the Employer's Liability Law, he must prove at the time of the said happening he

was engaged in one of those things declared and determined by said law to be a hazardous occupation, and I further charge you that if he was, at the time, engaged in work in or about open pits, open cuts, mines—(addressing counsel) I don't believe you claim under "open pits or open cuts" in your complaint and it is merely that you claim that the work was done in connection with ore reduction works and mining, so I will modify it. I was simply reading it because it was all in one paragraph, not that I think the word "quarries" has anything to do with this case (addressing the jury), but that all work in and about mines, ore reduction works and smelters, if he was so engaged in that work, he was engaged in a hazardous occupation within the meaning of the law referred to.

Now, the plaintiff, in order to recover under the Arizona Employer's Liability Law, is required, as has been said by the Supreme Court of Arizona, to allege in his complaint (39) [71] and to sustain by evidence, that he was employed by the defendant in an occupation declared to be hazardous, that while engaged in the performance of his duties required of him, he was injured, that the injury was caused by an accident due to a condition or conditions of such employment and was not caused by his own negligence.

Those are the burdens which the plaintiff must discharge and he cannot recover unless he comes within the provisions of that law.

Now, you will, if you have paid close attention, observe that the law says that the accident must

arise out of and be due to a condition or conditions of the employment. That is puzzling term to lawyers and until recently it has never been defined by any court so far as I know, but recently the Supreme Court of Arizona defined it in these words, speaking of the meaning of the words "condition or conditions," it said: "It is evident that the accident must arise out of and also be inherent in the occupation itself. The condition or conditions that produce the accident must inhere in the occupation. If the occupation is nonhazardous, if the condition or conditions inherent therein are innocuous," that is, harmless, or producing no ill effects, "the occupation and the employee therein are outside of the purpose of the purview of the constitution and of the liability law." Now, to be inherent in, or rather, to "inhere" as used in that statute, is to be inherent, to be a fixed element or attribute of a thing. Inherent, existing in something as a permanent attribute or connected with something as a settled function, and "innocuous" as I told you, means harmless or producing no ill effect. (40) [72]

The first question for you to determine is whether the plaintiff at the time and place mentioned in the complaint, and while in the service and employment of the defendant, and in the course of his work in such employment, received the injuries or any of the injuries, described, set forth in his complaint. If you find from the preponderance of the evidence that the plaintiff in the course of his labor and while in the service or employment of the defend-

ant received the injuries or any of the injuries complained of, then you will determine whether such injury was due to a condition or conditions of his occupation or employment, as those terms have been, or that term has been defined to you, and whether such injuries were caused by the negligence of the plaintiff. If you come to the conclusion from the evidence that the injuries were caused by his own negligence, of course, you need not go any further in the case, you stop right there and render a verdict for the defendant.

Now, by negligence, negligence is this: It is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing that such person under the existing circumstances would not have done. The fault may lie in commission or omission, that is in the doing, or the failure to do, and the duty is dictated and measured by the exigency of the particular occasion. Before you can find that the plaintiff was guilty of negligence so as to defeat a recovery on his part, you must find that the negligence was the proximate and efficient cause of the injury complained of; in other words, that such negligence on his part caused or brought about the injury or injuries of which he complained. Of course, every workman should take reasonable care and precaution for his own safety in working and discharging his duties, and if he fails to do so, he cannot recover, that is, if his negligence was the cause or that which brought about the injury. (41)

Now, before the plaintiff can recover under the terms of this Act, he must show that his injuries, if he was injured, were due to an accident arising out of and in the course of his employment in an occupation as I said before, declared by the Act to be hazardous. The words "arising out of" refer to the origin or cause of the injury, and the words "in the course of" refer to the time, place and circumstances under which the accident causing the injury occurred. Unless you find from the evidence in this case that the accident to the plaintiff causing the injury was one arising out of and in the course of his employment, and at the time of his injury, if he was injured, he was engaged in a hazardous occupation, your verdict must be for the defendant.

Numerous requests have been made, Gentlemen, and in determining, in passing upon them, it may be that some of them may be couched in a little different language from the charge that I give, and so if there appears to be repetition, you will understand why.

Now, I say, if you find from the testimony that the plaintiff at the time and place mentioned in the complaint, while engaged in the performance of his duties, sustained the injury or injuries set up in the complaint, and that such injury or injuries were not caused by or were not the result of his negligence, and were caused by an accident due to such condition or conditions or employment, then you will next consider the nature and extent of his injury or injuries so sustained. In this connection the burden of proof is upon the plaintiff to show by

a preponderance of evidence, not only to prove the material allegations of his complaint, but to show that the injuries, defects and afflictions of which he complains, or some of them of which he complains, are the proximate result of said accident, and of (42) [74] course plaintiff cannot recover for any injuries other than those which he has shown by a preponderance of the evidence to have been sustained at the time and place mentioned in the complaint, or are the result of such injury or injuries so received at said time and place.

You are made the judges as to the extent of the injuries, if any, so sustained. It is not for the Court; it is for you to determine that question of fact, that is, as to whether or not they are temporary or permanent in character, and as to what extent, if any, by reason of such injuries only, plaintiff has suffered mental and physical pain and anguish or both, and also as to what extent, if at all, he has been by reason of such injuries disabled and incapacitated from following his usual or any gainful, profitable occupation, and as to whether or not such incapacitation, if any, is permanent or merely temporary.

If you award damages to the plaintiff in this case, in addition to those factors that I have just mentioned, the injuries and the pain and suffering, if any, you will also or may also make due and adequate allowance for the reasonable value of the time lost by the plaintiff as a result of such injury or injuries from the date they were so sustained to the present time, and in connection with that state-

ment of my own I give you a further instruction; you will not under any consideration find damages for any prospective loss of time on the part of the plaintiff after the date of trial, and you will not include this element of loss of time after the date of trial in any damages whatsoever, if you should find that any damages have been sustained. You may consider all the facts and circumstances and his physical condition in determining whether or not he has been incapacitated by reason of such injury or injuries, and may consider (43) [75] that fact in calculating general damages, if any you decide to give him. The sum of \$4.60 daily wage need not be accepted by you as the basis for the measure of special damages if you find any such. That sum is the maximum amount plaintiff can be allowed for the period he claims special damages, but you may find any smaller sum, if you find any special damages. In other words, while the plaintiff introduced evidence to show that he was receiving \$4.60 a day and that he claims he has lost that sum per day since the date of his injuries to the date of trial, you are not bound by that specific sum, but you may consider that and determine whether or not you accept that, if you award him damages for such loss of time, or whether you will fix it at some other amount. Now, in the ascertainment of damages we pass now from the question of whether or not he was injured and whether or not the injury or injuries were permanent, and if you find that he was injured, then you must determine, as I said before, the extent of the injuries, and whether they

are temporary or permanent, and after you have determined that question, then—and if you do determine that he is entitled to such damages by reason of such injuries, then you proceed to ascertain and determine the amount of damages that should be awarded to him.

Now, in the ascertainment of damage, the law does not lay down any mathematical or definite rule. It says that you, the jury, must determine that matter and that in so doing that you must use sound judgment and good sense and make such an award as would be just compensation for the injury or injuries so sustained, no more and no less. You are not to give anything to the plaintiff because of his age or through sympathy, or because you may have sympathy for his wife, or because the defendant is a corporation, but you are to decide this (44) [76] case just as you would if the defendant—I will change that,—just the same as if it were an action between two individuals, and you are not to determine it, fix the damages or give any damages at all by reason of the fact that the defendant is a poor man or the defendant has a family—I mean that the plaintiff is a poor man or that the plaintiff has a family, or the defendant is a corporation, unless you believe he is justly entitled to it, and then give him such as would be just compensation, all of that and no more. In other words, you decide the case impartially regardless of consequences, whether it is pleasing to one side or the other. You are here to see that justice is done between these litigants, and when litigants cannot agree and

go into court, then it is the duty of the court and jury to determine their controversy and to do justice between them as nearly as may be.

Now, the Mortality Tables were introduced in evidence in this case and those tables show that the life expectancy of a man fifty-seven years of age is sixteen and a half years. Now, that doesn't show how long this man—and it is not introduced for the purpose of showing how long this man will live. No man can tell that, but it is received for the purpose of showing his probable duration of life, of the probable duration of life of a man fifty-seven years of age. It cannot be claimed that a man will certainly be able to work all the remaining years of his life and be as vigorous as he is at fifty-seven, but in ascertaining the amount that the plaintiff is entitled to, and in considering his damages, if any, and in considering to what extent his capacity has been diminished by reason of the injuries, you are to take into consideration his age, in the first place, his past life, whether or not he was constantly employed, whether or not he was able to do the work, whether or not it is likely that (45) [77] in the future he would continue to be able to do the work and earn the wages which he claims he has received and earned in past years. You are to determine whether or not it is likely he would be constantly employed, whether he would be sick or out of employment, and consider all those matters in determining what amount of compensation, if any you determine should be allowed to him.

Now, you understand, Gentlemen, I think I stated at the time, and I repeat that if you come to the con-

clusion that these injuries of which the plaintiff complains are merely temporary, not permanent in character, then the Mortality Tables, the expectancy tables, have absolutely no place in this case. They are introduced upon the theory that the evidence in the case has shown that the injuries were permanent. Now, that is not a question for me to determine, the question of whether the injuries are permanent is a question for you to determine. If you determine from all the evidence that the injuries of which the plaintiff complains were permanent, then you may use the mortality tables as a basis of calculation and for whatever they are worth in your judgment, but if you come to the conclusion that the plaintiff is not permanently injured, that his capacity to earn a living has not been permanently impaired by the injury or injuries, then you will not consider the mortality tables or the expectancy tables at all. The Supreme Court has said that they are admissible, but that the rule to be derived from these tables may not be the absolute guide of the conscience and judgment of the jury, but the Court does state that where there is any testimony tending to show permanent injuries, they are admissible. Now, in admitting the tables as I said before, I did not determine that they are permanent. That is for you to determine. If you find that they are permanent, then you consider the tables in connection with all the other facts and circumstances of the case. If (46) [78] you do not believe they are permanent, then you must not consider the tables at all. In the language of that Court, the Supreme Court of the

United States, "But it has never been held that the rules to be derived from such tables or computations, must be the absolute guide of the judgment and conscience of the jury. On the contrary, in the important and much considered case of London against Phillips and Southwestern Railway, the Judges strongly approved the practice of instructing the jury in general terms to award a fair and reasonable compensation, taking into consideration what the plaintiff's income would probably have been, how long it would have lasted and continued, and all the contingencies to which it was liable, and has strongly deprecated undertaking to bind the jury by precise mathematical rules in deciding a question involving so many contingencies, incapable of exact estimate or proof," etc.

Now, as I told you, the expectancy of life is not the same as the expectancy of the duration of ability to work in the case of physical labor, and if the expectancy of life is considered in any case, then the fact that the expectancy of life is materially greater than the probable duration of the period of ability to work must also be considered, since it is the period of expectancy of ability to work which is to be considered, if and when the future earning capacity has been impaired, and future damages can only be awarded in a case when the evidence shows it to be a reasonable certainty; the Supreme Court uses the word "probability."

You must not consider or regard any incapacity or bad physical condition or ill effects of plaintiff, if any, or any ill effects plaintiff may be suffering

on account of other (47) [79] conditions not the proximate result of this alleged accident. If there are any other conditions, you must consider such effects, if any, as are the direct result of the accident, as alleged in the plaintiff's complaint. In cases where future damages have been proved by the evidence and the jury awards damages therefor, the element of advancing age must be taken into consideration. Where earning capacity depends upon physical strength, necessarily physical strength becomes impaired by advancing age and earning capacity is consequently diminished. When a man remains uninjured and in ordinarily good health, this fact must be taken into consideration in such cases and the jury must not consider that the man's earning power will remain constant, except during the period of his entire expectancy for work. As I stated before, Gentlemen, if you find that the plaintiff is entitled to recover in this action, the amount of recovery, if any, is for you to determine from all the facts in the case. Of course, you cannot measure in dollars and cents the exact amount to which he is entitled, if any, but it is for you to say, in the exercise of a sound discretion from all the facts in the case, after considering and weighing all the evidence produced before you, without fear and without favor and without passion or prejudice, what amount of money will reasonably compensate him for the damage, if any he has sustained, and in order for you to determine the question of fact, it is not necessary that any witness should have expressed any opinion

as to the amount which he believes the plaintiff should be awarded.

Now, you are made by law the sole judges of the facts and of the credibility of the witnesses. In determining the credibility of the witnesses and the weight you will give to their testimony, you have the right to take into consideration their manner and appearance while giving their testimony, (48) [80] their means of knowledge, any interest or motive which they may have, if shown, and the probability or improbability of the truth of their statements when considered in connection with all the other testimony in the case. You are not to disregard the testimony of the plaintiff because he is the plaintiff and interested in the result of the case, nor are you to disregard the testimony of his witnesses because of relationship or friendship. You are not to disregard the testimony of the witnesses for the defendant because they are in the employ of the defendant or because they may be interested in the result of the case, but you are to consider the testimony of all the witnesses fairly and impartially, taking into consideration any interest or motive they may have in the result of the case, and then determine what weight should be given to their testimony. If you believe that any witness has wilfully sworn falsely, intentionally sworn falsely, to a material fact in the case, then you have a right to entirely disregard the testimony of that witness or those witnesses, except in so far as they may be corroborated by other evidence in the case, or by the facts and circumstances in evidence. In other words, Gentlemen,

it is your duty in arriving at a verdict in this case to be governed by the evidence in the case and the law as I am giving it to you in these instructions, regardless of consequences. You are to look at the evidence in a common sense light and to judge of it by that experience and observation of human affairs of which you are possessed as individual members of society, and endeavor to arrive at the truth as the evidence shows it to be. That is a question which you should endeavor and will endeavor to do, to arrive at the truth of this transaction, and then after having so arrived at the truth, let that be represented by your verdict. (49) [81]

Your verdict must be unanimous whichever way you decide the case, and the practice which prevails in the State Courts of allowing a jury of nine of the jury of twelve to return a verdict in a civil case, does not prevail in the Federal Court. The Supreme Court has held that a jury within the contemplation and meaning of the Constitution of the United States means a jury of twelve and not a jury of nine, so that your verdict must be unanimous.

You must not render what is known as a quotient verdict, that is, you must not add together the amounts or the sums which each of you believe the plaintiff is entitled to and then divide it by twelve or any other number. Such or any similar method of arriving at the plaintiff's compensation would not be awarding a just compensation and fair to either the plaintiff or the defendant. It does not mean that you may not discuss what the plaintiff is entitled to, if anything, and finally come to an agree-

ment as to what that amount shall be and representing the unanimous verdict of the jury, but you should not attempt to do it by any such mathematical calculation as I have referred to.

The COURT.—Are there any exceptions on either side to the general instructions?

Mr. CORNICK.—We have exceptions. I didn't know whether your Honor charged all of our requests?

The COURT.—No, I did not; some I gave and some I did not. I will give you an exception to all refused.

Mr. O'SULLIVAN.—Your Honor, we have no exception at all to the Court's instructions. (50) [82]

Mr. CORNICK.—We desire to except to that portion of your Honor's instructions charging to the effect that all work in and about mines, reduction works, smelters, and so forth, fall within those occupations determined and defined by the statute as being hazardous. Second, we except to so much of your Honor's charge—

The COURT.—I wish the jury to consider that statement in connection with the further statement in the charge that the injury or injuries must have shown by a preponderance of the evidence to have arisen out of and in the course of the plaintiff's service or employment and due to an accident arising out of the service and employment and due to a condition or conditions of the employment and not due to the negligence of the plaintiff. In other words, I would not want that one sentence considered wholly independently of the balance of the charge, but in

connection with the charge which I made when I quoted from the case of C. & A. against Chambers, in which I read the duty of the plaintiff before he could recover under this Employer's Liability Law. In other words, I want them to understand that the plaintiff must show by a preponderance of the evidence not only the things mentioned in that case, but that it must also be shown that at the time he was engaged in the service and employment in and about the said hazardous occupation of mining, ore reduction works and smelters. (51) [83]

Mr. CORNICK.—Well, we understand, your Honor, that that does not cure the exact points that we make.

The COURT.—You may have an exception to it.

Mr. CORNICK.—We desire further to except to that portion of your Honor's charge, charging that the jury shall determine whether temporary or permanent injuries were received by the plaintiff, on the ground that there is no evidence of permanency justifying a submission of that question to the jury.

The COURT.—Very well.

Mr. CORNICK.—Further, we desire to except to that part of your Honor's charge as to the mortality tables, because there is no evidence as to the fact that the plaintiff would fall in his occupation within the occupation upon which the mortality tables are based.

The COURT.—Note the exception.

Mr. CORNICK.—And further to that part of your Honor's charge with regard to the mortality tables, permitting the jury to define the relationship of the plaintiff's expectancy to the expectancy as

shown, expectancy of life, as shown by the mortality tables, because there is no evidence in the record upon which the jury could make such a definition or find such a relationship between the plaintiff's expectancy of life and the expectancy of life as defined by the mortality tables.

The COURT.—Very well. Gentlemen of the Jury, if you find for the plaintiff, the form of your verdict will be, "We, the Jury, duly impaneled and sworn in the above-entitled cause, upon our oath do find for the plaintiff and (52) [84] assess his damage at blank dollars," inserting whatever amount you determine should be awarded to him. If you find for the defendant, the form of your verdict would simply be, "We, the Jury duly impaneled and sworn, upon our oath do find for the defendant," and cause your foreman whom you will select, to sign the verdict which represents your conclusion. (53) [85]

The following instructions, requested by defendant, were refused by the Court, and exception allowed defendant:

REQUEST No. 3.

There is no evidence in this case proving the alleged injury was of a permanent character, and the alleged injury must not be considered permanent by you in the consideration of this case.

REQUEST No. 7.

The defendant is not responsible in damages to plaintiff because the plaintiff could not get or did not get work after he left defendant's employ, or because plaintiff did not get work which he considered

he could do. The fact, if such it is (54) [86] found to be, that the plaintiff could not or did not get work should be disregarded by you in any consideration of damages, if any, on account of loss of time between the date of the injury and the date of trial.

REQUEST No. 10.

I charge you that under the allegations of the 4th paragraph of plaintiff's complaint, the plaintiff could recover, if at all, only upon competent evidence that the work and occupation in which he was engaged at the time of the happening of the accident was in that occupation defined under paragraph 5 of Sec. 3156, R. S. A., 1913, which is as follows:

“All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge structure or other work in which the same are used.” [87]

The evidence hereinbefore set out contains all the testimony given on the trial and constitutes all the evidence upon which the Court's instructions aforesaid were based and affecting the matters to which defendant's exceptions relate.

Thereafter the jury returned a verdict of Eight Thousand (\$8,000) Dollars in favor of plaintiff.

Thereupon defendant's counsel made motions to set aside the verdict, in arrest of judgment and for a new trial, filing said motions on December 3, 1920, and giving notice thereof. No hearing was had,

and on April 4, 1921, the Court overruled said motions, to which ruling defendant excepted.

The Court then caused an order to be made and entered on April 11, giving defendant 30 days from April 4, 1921, to prepare and serve its bill of exceptions.

Defendant served its said bill upon counsel for plaintiff on May 4, 1921, and presents this its bill of exceptions and asks that same be examined, approved and allowed by the Court and filed made and deemed to be a part of the record in this cause.

The defendant prays that this bill of exceptions may be settled, allowed and signed.

FAVOUR & CORNICK,

Attorneys for Defendant.

Approved, settled and allowed May 24, 1921.

WM. H. SAWTELLE,

Judge. [88]

[Endorsements]: In the District Court of the United States, in and for the District of Arizona. John T. Littlejohn, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Bill of Exceptions. Filed May 5, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk.

Copy received this 4th day of May, 1921.

O'SULLIVAN and MORGAN,

Attorneys for Plaintiff. [89]

In the District Court of the United States, in and for
the District of Arizona.

No. L-85—PRESCOTT.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Petition for Writ of Error and Order Allowing Same.

And now comes the United Verde Extension Mining Company, defendant in the above-entitled action, and says: That on November twenty-seventh, 1920, a jury duly impaneled in the above cause returned a verdict for the plaintiff for the sum of Eight Thousand Dollars (\$8,000.00), and judgment was entered accordingly in favor of the plaintiff; that in the proceedings, instructions and judgment had in this cause, certain errors were committed to the prejudice of the defendant, all of which will in more detail appear from the assignment of errors, which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for correction of errors so complained of, and that a transcription of the records of the proceedings and the papers in this case duly authenticated may

be transmitted to the said Circuit Court of Appeals.

FAVOUR & CORNICK,
Attorneys for Defendant. [90]
ORDER.

Writ of error allowed on the assignment of errors filed with this petition, upon giving bond by the defendant as required by law for the sum of Eight Thousand Five Hundred Dollars (\$8,500.00).

WM. H. SAWTELLE,
Judge.

Made this 24th day of May, 1921. (2) [91]

In the District Court of the United States, in and for
the District of Arizona.

No. L-85.

JOHN T. LITTLEJOHN,
Plaintiff,
vs.

**UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,**
Defendant.

Assignment of Errors.

Comes now defendant, United Verde Extension Mining Company, files herewith its following assignment of errors in connection with and as a part of its petition for a writ of error filed herein, which it avers were committed by the Court in the proceedings in this case, before and after the rendition of the judgment in the records herein, and

upon which assignment of errors defendant relies in the prosecution of the writ of error from the judgment, orders and rulings of the Court.

The Court erred to the prejudice of the defendant (exception having been taken to said orders and rulings):

I.

In overruling and denying defendant's motion that plaintiff be required to strike from his complaint the last sentence in paragraph V, "That he has sustained special damages for loss of time by reason of said injuries in the sum of Four and 60/100 Dollars (\$4.60) per day from June 2, 1920, until the trial of this cause, less said period of seventeen days afore-said"; for the reason that the said allegation is speculative as to the time after date of instituting and no recovery for such special [92] damage is authorized or contemplated under the Employer's Liability Law.

II.

In overruling defendant's motion to strike paragraph 2 of the prayer of plaintiff's complaint on page 6, praying judgment "for the sum of \$4.60 per day from June 2, 1920, until the trial of this cause (less a period of seventeen days) for special damages for loss of time occasioned by reason of said personal injuries sustained"; for the reason that the sum prayed for is speculative and uncertain.

III.

In overruling defendant's first demurrer to plaintiff's complaint, for the reason that no facts are stated to show that plaintiff was engaged in a hazardous occupation at the time of the accident.

IV.

In overruling defendant's second demurrer to plaintiff's complaints, for the reason that there are no facts stated showing loss of time due to the accident, or showing any special damages or right of recovery for such special damages under the Employer's Liability Law.

V.

In overruling the objection of the defendant and the motion of the defendant to strike out the testimony of the plaintiff relating to what was alleged to have been told him concerning liability insurance supposed to have been carried by the defendant, for the reason that said testimony had been given in response to permission given by the Court to the plaintiff to testify and such testimony concerning insurance is prejudicial to an employer. (2) [93]

VI.

In sustaining the objection of the plaintiff to which exception was made, to the request and demand by the defendant that the Court order a physical examination of the plaintiff by two disinterested physicians to be appointed by the Court, the plaintiff having introduced his head and physical condition in evidence; for the reason that the submission of plaintiff's head to examination by the jury made it an exhibit subject to a complete examination to elucidate the matter in dispute.

VII.

In overruling defendant's motion that a mistrial be declared because of the testimony given by the plaintiff on cross-examination, not in response to a

question by the defendant but after a suggestion of the Court, concerning the alleged carrying of liability insurance by the defendant; for the reason that the said testimony was prejudicial to the defendant and could not be corrected by striking.

VIII.

In overruling defendant's objection, to which exception was taken, to the testimony of the plaintiff's witness Harry Garrison, "that during three years prior to the accident, "he (plaintiff) was apparently healthy and sound"; for the reason that the witness was not qualified to express such an opinion and the said testimony was solely a matter of opinion and not of fact.

IX.

In overruling the defendant's objection, to which exception was taken, to testimony on direct examination of plaintiff's wife respecting alleged signs of pain exhibited by plaintiff, as follows: (3) [94]

"Q. Did he manifest any signs of pain?"

(Objection by defendant to the line of testimony; objection overruled; exception taken.)

"Q. Please tell the jury what you noticed by way of your husband's manifestation of pain after his injury."

"A. Well, he was restless of a night and when he was sleeping he moaned in his sleep."

X.

In overruling objection, to which exception was taken, to the admission in evidence of mortality tables, for the reason that there was no legal evidence and substantial evidence to a reasonable cer-

tainty of permanency of any alleged injury.

XI.

In denying defendant's motion for a directed verdict for the defendant at the close of the evidence, to which ruling exception was taken, for the reasons stated in said motion that there was no evidence that plaintiff was in a hazardous occupation at the time of the accident, and that there was no substantial evidence to sustain a verdict for plaintiff.

XII.

In overruling defendant's objection, to which ruling exception was taken, to the argument of counsel for plaintiff to the jury, "Now, we have asked for ten thousand dollars. You gentlemen know that ten thousand dollars to-day is not worth as much as five thousand dollars a few years ago," and in permitting the said counsel to argue and to ask the jury to determine whether the purchasing power of a dollar to-day is less than formerly; for the reason that said argument was immaterial to the issue raised upon facts not in evidence and prejudicial to the defendant. (4) [95]

XIII.

In instructing the jury over objection and exception of the defendant as follows:

"I charge you, as a matter of law, Gentlemen, that all work in and about mines, ore reduction works and smelters is a hazardous occupation within the meaning of the law. Therefore, if you believe from a preponderance of the evidence, that the plaintiff, at the time he claims to have been injured was work-

ing in and about open pits, open cuts, mines, ore reduction works, or smelters, he was at the time engaged in a hazardous occupation and that it comes within the meaning of the Employer's Liability Law."

XIV.

In instructing the jury over objection and exception of the defendant as follows:

"And I further charge you that if he was, at the time, engaged in work in or about open pits, open cuts, mines,—(addressing counsel) I don't believe you claim under 'open pits or open cuts' in your complaint and it is merely that you claim that the work was done in connection with ore reduction works and mining, so I will modify it. I was simply reading it because it was all in one paragraph, not that I think the word 'quarries' has anything to do with this case, (addressing the jury) but that all work in and about mines, ore reduction works and smelters, if he was so engaged in that work, he was engaged in a hazardous occupation within the meaning of the law referred to."

XV.

In instructing the jury over objection and exception of the defendant as follows:

"You are made the judges as to the extent of the injuries, if any, so sustained. It is not for the Court; it is for you to determine that question of fact, that is, as to whether or not they are temporary or permanent in character, and as to

what extent, if any, by reason of such injuries only, plaintiff has suffered mental and physical pain and anguish or both, and also as to what extent, if at all, he has been by reason of such injuries disabled and incapacitated from following his usual or any gainful, profitable occupation, and as to whether or not such incapacitation, if any, is permanent or merely temporary.”

“Now, in the ascertainment of damages we pass now from the question of whether or not he was injured and whether or not the injury or injuries were permanent, and if you find that he was injured, then you must determine, as I said before, the extent of the injuries, and whether they are temporary or permanent, and after you have determined that question, then—and if you do determine that he is entitled to such damages by reason of such injuries, then you proceed to ascertain and determine the amount of damages that should be awarded to him.” (5) [96]

XVI.

In refusing to instruct the jury as requested by defendant in its Instruction No. 3, to which ruling defendant excepted as follows:

“There is no evidence in this case proving the alleged injury was of a permanent character, and the alleged injury must not be considered permanent by you in the consideration of this case.”

XVII.

In refusing to instruct the jury as requested by

defendant in its Instruction No. 7, to which ruling defendant excepted as follows:

“The defendant is not responsible in damages to plaintiff because the plaintiff could not get or did not get work after he left defendant’s employ, or because plaintiff did not get work which he considered he could do. The fact, if such it is found by you to be, that the plaintiff could not or did not, get work should be disregarded by you in any consideration of damages, if any, on account of loss of time between the date of the injury and the date of trial.”

XVIII.

In refusing to instruct the jury as requested by defendant in its Instruction No. 10, to which ruling defendant excepted, as follows:

“I charge you that under the allegations of the 4th paragraph of plaintiff’s complaint the plaintiff could recover, if at all, only upon competent evidence that the work and occupation in which he was engaged at the time of the happening of the accident was in that occupation defined under paragraph 5 of Sec. 3156, R. S. A. 1913, which is as follows:

“ ‘All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.’ ”

XIX.

In refusing to instruct the jury as requested by

defendant in its Instruction No. 6, to which ruling defendant excepted as follows:

“This being an action based upon the Employer’s Liability Law of Arizona, as set out in paragraph 6 of plaintiff’s complaint, it is incumbent upon the plaintiff to allege and prove that he was at the time of the alleged accident and injury engaged in one of the occupations declared and determined to be hazardous within the meaning of said law. (6) [97]

“The 4th paragraph of plaintiff’s complaint alleges that at the time of the alleged accident the plaintiff was in employ of defendant and was directed and ordered by said defendant corporation and its foreman in charge of said bull gang to assist in installing certain equipments, in defendant’s sample-mill then and there being a mill used by defendant to sample, treat and crush ores, and said sample-mill then and there being a part of said smelter and ore reduction works, and an appurtenance thereto; that plaintiff did thereupon engage in said work as directed; that while plaintiff was assisting in putting in said equipment in said sample-mill, he was then and there ordered and directed by defendant corporation and its said foreman of said bull gang to place and install in the frame work of certain rolls or rollers in said sample-mill a large iron bolt or rod approximately four feet in length by about two inches in diameter, and weighing approximately one hundred pounds; that plaintiff, while then and there in the due

course of his said occupation and employment, was then and there ordered and directed by defendant and its said foreman of said bull gang to take said iron bolt or rod and go upon a certain board platform then and there covering a certain concrete pit about ten feet deep by about the same dimensions in width and length; and then and there situate below said platform and in said sample-mill aforesaid; that plaintiff, as directed, did take said iron bolt or rod in his arms and did proceed to and upon said board platform for the purpose of placing and installing the same as aforesaid.

“I charge you that before plaintiff can recover under the allegations of his complaint he must by competent evidence prove that he was at the time of the happening of the alleged accident and injury engaged in one of the occupations declared and determined to be hazardous by the Employer’s Liability Law; he must prove that at the time of the said happening he was then engaged in doing one of those things declared and determined by the said law to be a hazardous occupation.”

XX.

In denying the motion of defendant that the verdict and judgment be set aside as indefinite and uncertain and not responsive to the issues, which ruling was excepted to by defendant; for the reason that the complaint and prayer state two issues, one for special and one for general damages, and the ver-

dict was for one sum without stating on which of the issues it was given.

FAVOUR & CORNICK,
Attorneys for Defendant. [98]

[Endorsements]: In the District Court of the United States, in and for the District of Arizona. John T. Littlejohn, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Petition for Writ of Error and Assignment of Errors. Filed May 19, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk.

Copy received May 18, 1921.

O'SULLIVAN & MORGAN,
Attorneys for Plaintiff. [99]

At a regular term, to wit, the May Term, 1921, of the United States District Court for the District of Arizona, held in the courtroom of the said court in the city of Tucson, State and District of Arizona, on Tuesday, May 24, 1921—Honorable WILLIAM H. SAWTELLE, District Judge, presiding.

(Minute Entry—May 24, 1921.)

L-85 (PRESCOTT).

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

**Minutes of Court—May 24, 1921—Order Granting
Petition for Writ of Error.**

IT IS ORDERED that the petition of the defendant herein for writ of error be, and it is granted; and

IT IS FURTHER ORDERED that the said writ be allowed upon giving bond by defendant, as required by law, for the sum of \$8500.00. [100]

In the District Court of the United States in and
for the District of Arizona.

No. L-85—PRESCOTT.

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Stipulation Fixing Time to File Supersedeas Bond.

IT IS HEREBY STIPULATED and agreed by and between the plaintiff and the defendant that defendant shall have to and including June 1, 1921, in which to file his supersedeas bond in the sum of \$8500, as ordered by the Court

O'SULLIVAN & MORGAN,

Attorneys for Plaintiff.

FAVOUR & CORNICK,

Attorneys for Defendant.

[Endorsement]: Filed May 27, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [101]

Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS: That we, United Verde Extension Mining Company, a corporation, as principal, and George Kingdon and David Morgan, as sureties, are held and firmly bound unto John T. Littlejohn, defendant in error, in the full sum of Eight Thousand Five Hundred Dollars (\$8,500.00), the same being the amount of the bond fixed by the District Court of the United States, for the District of Arizona, by order duly entered on the records of said Court on the nineteenth day of April, 1921, to be paid to the said defendant in error, his legal representative, executor, administrator or successor, to which payment, well and truly to be made, we bind ourselves, and our and each of our successors, heirs, executors, administrators and legal representatives, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of May, 1921.

WHEREAS, on the twenty-seventh day of November, 1920, at the District Court of the United States, for the District of Arizona, in a suit pending in said court, between John T. Littlejohn, plaintiff, and United Verde Extension Mining Company, defendant, a judgment was rendered in favor of plaintiff and against the said defendant for the sum of Eight

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Thousand Dollars (\$8,000.00), with interest thereon until paid at the rate of six per cent per annum together with the sum of One Hundred Nine and 40/100 Dollars, costs of action, and the said defendant has obtained a writ of error to reverse said judgment in the aforesaid action, and filed a copy thereof in the clerk's office of said court, and a citation directed to the said John T. Littlejohn plaintiff, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, State of California. [102]

NOW, THEREFORE, the condition of the obligation is such that if the said United Verde Extension Mining Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make said plea good, then the above obligation to be void; else to remain in full force and effect.

UNITED VERDE EXTENSION MINING
COMPANY.

By L. E. WHICHER,
Vice-Prest.,
Principal.
C. P. LUND,
Secty.

[Seal]

GEO. KINGDON.
DAVID MORGAN.

State of Arizona,
County of Yavapai,—ss.

On the 25th day of May, 1921, personally appeared before me George Kingdon and David Morgan, re-

spectively known to me to be the persons described in and who duly executed the foregoing instrument as parties thereto and respectively acknowledged, each for himself, that they executed the same as their free act and deed, for the purposes therein stated.

And the said George Kingdon and David Morgan, being by me duly sworn, each for himself and not one for the other, says, that he is a resident and householder of the said County of Yavapai, and that he is worth the sum of Eight Thousand Five Hundred Dollars (\$8,500.00) over and above his just debts and legal liabilities and property exempt from execution.

[Seal]

GEO. KINGDON,

DAVID MORGAN.

Subscribed and sworn to before me this 25th day of May, A. D. 1921.

My commission expires January 7, 1922.

DAISY D. JONES,

Notary Public.

The within bond is approved both as to sufficiency and form this 28th day of May, 1921.

WM. H. SAWTELLE,

Judge. (2)

[Endorsements]: Supersdeas Bond. Copy delivered May 26, 1921, to office of O'Sullivan & Morgan.

FAVOUR & CORNICK,

Attys. for Defendant.

Filed May 27, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [103]

In the District Court of the United States, in and for
the District of Arizona.

L-85. (PRESCOTT).

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Writ of Error (Copy).

The President of the United States to the Honorable
Judge of the United States District Court for
the District of Arizona, GREETING:

Because in the records and proceedings, as also in
the rendition of the judgment, of a plea which is in
the aforesaid District Court before you, between
John T. Littlejohn, plaintiff, and the United Verde
Extension Mining Company, a corporation, defend-
ant, a manifest error has happened to the great dam-
age of the said defendant, as by its complaint and
assignment of errors appears, we being willing that
error, if any there has been, shall be duly corrected
and full and speedy justice done to the parties afore-
said in this behalf, do command you if judgment be
therein given, that then, under your seal, distinctly
and openly, you send the record and proceedings
aforesaid, with the things concerning the same, to
the United States Circuit Court of Appeals for the
Ninth Circuit, together with this writ, so that you

have the same at San Francisco, California, in said Circuit within thirty (30) days of the date of this Writ, in said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further [104] to be done therein to correct that error what of right and according to the law and customs of the United States shall be done.

WITNESS the Honorable JOSEPH McKENNA, Associate Justice of the Supreme Court of the United States, this 27th day of May, 1921, and of the Independence of the United States the one hundred and forty-fifth.

C. R. McFALL,
Clerk.

By Clyde C. Downing,
Chief Deputy Clerk.

[Endorsements]: Writ of Error. Filed May 27, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [105]

In the District Court of the United States in and for
the District of Arizona.

L-85 (PRESCOTT).

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Citation on Writ of Error (Copy).

The President of the United States to John T. Littlejohn and O'Sullivan and Morgan, Your Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, California, in said Circuit, within thirty (30) days from the date hereof, pursuant to the writ of error filed in the clerk's office of the District Court of the United States for the District of Arizona, wherein the United Verde Extension Mining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable JOSEPH McKENNA, Associate Justice of the Supreme Court, this 28th day of May, 1921, and of the Independence of the United States the one hundred and forty-fifth.

WM. H. SAWTELLE,
United States District Judge for the District of Arizona.

UNITED STATES MARSHAL'S RETURN.

I received the within writ at Phoenix, Arizona, Tuesday, May 31, 1921, and executed the same June 4, 1921, at Prescott, Arizona, by delivering a true copy

hereof to Jos. H. Morgan, a member of the firm of O'Sullivan & Morgan personally.

J. P. DILLON,
United States Marshal.
By Minnie Seaman,
Deputy. [106]

[Endorsements]: In the District Court of the United States in and for the District of Arizona. L-85—Prescott. John T. Littlejohn, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Citation on Writ of Error. Filed June 7, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [107]

In the District Court of the United States in and for
the District of Arizona.

L-85 (PRESCOTT).

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation.

Praeceptum for Transcript of Record.

To the clerk of the United States District Court for
the District of Arizona:

You will please prepare a transcript of the complete record in the above-entitled cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit under

the writ of error to be perfected to said court in said cause and include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

Judgment-roll.

Order overruling defendant's motion to strike.

Order overruling defendant's demurrer.

Transcript of all minute entries and orders.

Motion in arrest of judgment and to set aside verdict.

Motion for new trial.

Order extending time to serve bill of exceptions.

Bill of exceptions and approval.

Petition for writ of error, and order allowing writ.

Assignment of errors.

Order fixing amount of bond.

Stipulation for extension of time to file bond.

Bond.

Writ of error.

Citation.

Praeipice for transcript.

—and all other records, entries, pleadings, proceedings, papers and files necessary and proper to make a complete record upon said writ of error in said cause.

Said transcript to be prepared as required by the law and the rules of this Court and the rules of the said United States Circuit Court of Appeals for the Ninth Circuit.

FAVOUR & CORNICK,
Attorneys for Defendant.

[Endorsements]: Copy received this 27th day of May, 1921.

O'SULLIVAN & MORGAN,
Attorneys for Plaintiff.

[Endorsements]: Praeipie for Transcript of Record. Filed May 31, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [108]

In the District Court of the United States in and for
the District of Arizona.

No. L-85 (PRESCOTT).

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

**Certificate of Clerk United States District Court,
District of Arizona, to Transcript of Record.**

United States of America,
District of Arizona,—ss.

I. C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of John T. Littlejohn, Plaintiff, vs. the United Verde Extension Mining Company, a Corporation, Defendant, said case

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being No. 85 (Prescott), on the Law Docket of said Court.

I further certify that the attached transcript contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk, in the city of Phoenix, State and District, aforesaid.

I further certify that the original writ of error and citation on writ of error are incorporated in said transcript of record.

I further certify that the cost of preparing and certifying to said record amounts to the sum of Thirty-two & 90/100 (\$32.90) Dollars [109] and that same has been paid in full by the plaintiff in error, United Verde Extension Mining Company, a corporation.

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States District Court for the District of Arizona, at Phoenix, in said District, this 16th day of June, 1921, and of the Independence of the United States of America the one hundred and forty-fifth.

[Seal]

C. R. McFALL,
Clerk United States District Court, District of
Arizona.

By Clyde C. Downing,
Chief Deputy Clerk. [110]

In the District Court of the United States in and for
the District of Arizona.

L-85 (PRESCOTT).

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Citation on Writ of Error (Original).

The President of the United States to John T. Littlejohn and O'Sullivan & Morgan, Your Attorneys,
GREETING:

You are hereby cited and admonished to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, California, in said Circuit, within thirty (30) days from the date hereof, pursuant to the writ of error filed in the clerk's office of the District Court of the United States for the District of Arizona wherein the United Verde Extension Mining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable JOSEPH McKENNA, Associate Justice of the Supreme Court, this 28th day of May, 1921, and of the Independence of the

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United States the one hundred and forty-fifth.

WM. H. SAWTELLE,
United States District Judge for the District of
Arizona. [111]

UNITED STATES MARSHAL'S RETURN.

I received the within writ at Phoenix, Arizona, Tuesday, May 31, 1921, and executed the same June 4, 1921, at Prescott, Arizona, by delivering a true copy hereof to Jos. H. Morgan, a member of the firm of O'Sullivan & Morgan, personally.

J. P. DILLON,
United States Marshal.
By Minnie Seaman,
Deputy.

[Endorsed]: Mar. Docket No. 1119, page 27. In the District Court of the United States in and for the District of Arizona. L-85 (Prescott). John T. Littlejohn, Plaintiff, vs. United Verde Extension Mining Company, a corporation, Defendant. Citation on Writ of Error. Filed June 7, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [112]

In the District Court of the United States in and for
the District of Arizona.

L-85 (PRESCOTT).

JOHN T. LITTLEJOHN,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,

Defendant.

Writ of Error (Original).

The President of the United States to the Honorable
Judge of the United States District Court for the
District of Arizona, GREETING:

Because in the records and proceedings, as also in
the rendition of the judgment, of a plea which is in
the aforesaid District Court before you, between John
T. Littlejohn, plaintiff, and the United Verde Extension
Mining Company, a corporation, defendant, a
manifest error has happened to the great damage of
the said defendant, as by its complaint and assign-
ment of errors appears, we being willing that error,
if any there has been, shall be duly corrected and
full and speedy justice done to the parties aforesaid
in this behalf, do command you if judgment be
therein given, that then under your seal, distinctly
and openly, you send the record and proceedings
aforesaid, with the things concerning the same, to
the United States Circuit Court of Appeals for the
Ninth Circuit, together with this writ, so that you

have the same at San Francisco, California, in said Circuit within thirty (30) days of the date of this writ, in said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further [113] to be done therein to correct that error what of right and according to the law and customs of the United States shall be done.

WITNESS the Honorable JOSEPH McKENNA, Associate Justice of the Supreme Court of the United States, this 27th day of May, 1921, and of the Independence of the United States the one hundred and forty-fifth.

[Seal]

C. R. McFALL,
Clerk.

By Clyde C. Downing,
Chief Deputy Clerk. [114]

[Endorsed]: No. —. In the District Court of the United States for the District of Arizona. L-85 (Prescott). John T. Littlejohn, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Writ of Error. Filed May 27, 1921. C. R. McFall, Clerk. By Clyde C. Downing, Chief Deputy Clerk. [115]

[Endorsed]: No. 3703. United States Circuit Court of Appeals for the Ninth Circuit. United Verde Extension Mining Company, a Corporation, Plaintiff in Error, vs. John T. Littlejohn, Defendant

in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Filed June 20, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

2

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,
Plaintiff in Error.

vs.

JOHN T. LITTLEJOHN,
Defendant in Error

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the United States District
Court in the District of Arizona.

FAVOUR & BAKER, of Prescott, Arizona,
Attorneys for Plaintiff in Error.

Filed this.....day of....., 1921.

.....
Clerk U. S. Circuit Court of Appeals.

Service of copy of within Brief is acknowledged
this.....*25th*.....day of August, 1921.

.....
Attorneys for Defendant in Error.

FILED
SEP - 2 1921
F. D. MONCKTON,
CLERK

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED VERDE EXTENSION
MINING COMPANY,

a Corporation,

Plaintiff in Error,

vs.

JOHN T. LITTLEJOHN,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

Note: The Transcript of Record will be referred to herein as "Tr.," giving page number; and Plaintiff in Error will be referred to as "Defendant," and the Defendant in Error as "Plaintiff."

STATEMENT OF CASE.

John T. Littlejohn filed action August 10, 1920, to recover damages for injuries alleged to have been received June 2, 1920, while he was employed by the defendant. He alleged in his complaint that he was employed as a laborer in the bull gang and worked "in and about the smelter," ore reduction works and other buildings, at work consisting of pick and shovel labor and the like; that on June 2nd he was directed by the foreman of the gang to assist in installing certain equipment in the sample mill of defendant company and was ordered to take a large iron bolt to be placed in the framework of

or for certain rolls, to do which he was to cross a platform covering a concrete aisle or pit which was a part of the construction and was about 10 feet deep; that while he had said bolt partly raised ready to place, the plank upon which he stepped broke and he fell with the bolt to the bottom; that he was hit by the bolt as he fell, his skull and head were bruised and injured and he was rendered unconscious and received a severe concussion of the brain, spinal column and shock to his nervous system, said injury being permanent, and suffered great pain and anguish; that he suffered general damages of \$10,000 and because of his inability to work, except for 17 days, had sustained special damages of \$4.60 per day until the trial. He prayed for two items of damage to wit for general damages in the sum of \$10,000 and for additional special damages for time lost to date of trial at \$4.60 per day.

The defendant moved to strike certain allegations and also the allegations and prayer for special damages, as an additional sum and separate issue, which latter portion of said motion was overruled. Demurrers were interposed by defendant to the sufficiency of the complaint, both for a general cause of action and for special damages as alleged and pleaded, and these demurrers were overruled. The said rulings were made without oral argument or hearing, in accordance with the practice frequently followed by the Court, and defendant was advised of the rulings by mail, and excepted thereto a few days later when the Court opened its session at Prescott. An answer was also filed by defendant, and the case was tried by jury November 26 and 27, 1920.

The evidence showed that plaintiff had been employed for some time in the bull gang which performed general labor, much of the time of a non-hazardous kind, around the grounds and buildings including an office building, all of which plaintiff termed the "smelter plant." (Tr. 36.) For a few days prior to June 2nd he had been leveling up gravel around the general office there; on June 2nd five of the men were taken by the foreman over to the sample mill; there was at the end of the mill, on the outside (Tr. 60), some concrete construction work; the men were working on the construction work, which had not been completed or placed in use as a part of the mill (Tr. 44), and on this day were putting in bolts in some framework. The concrete formed in part an aisle or pit about 10 feet in all dimensions. Three planks 12 in. by 2 in. were across this aisle (Tr. 37). In order to put in these bolts the men went over on these planks. Two of the men were standing, wholly or partially, on one of the planks, each with a bolt, when the plaintiff with another bolt stepped on the plank and it broke (Tr. 44 and 60). He fell to the bottom and by his fall was cut on his left forehead and received other scratches and bruises (Tr. 37 and 61). He was taken to the defendant's hospital where his injuries were dressed. He went home and returned to the hospital for treatment each day for 14 days and on June 15th went back to work and according to his testimony was given "light work as near as the boss could" (Tr. 38). He worked 17 days and was "laid off." He did not work for wages from then to the time of trial (Tr. 43). He stated he could not get light work "around there" (Tr. 42).

At the trial in November the plaintiff introduced testimony of a physician who had examined him for the purpose of giving testimony (Tr. 45). The plaintiff, by his counsel, refused to be examined by disinterested physicians to determine his condition due to the injury as he alleged (Tr. 43 and 57). Plaintiff, while a witness on his own behalf on direct examination, volunteered statements with reference to negotiations he had with the defendant company respecting settlement and also that the defendant company was insured against loss and damage to any of its men growing out of injury, which statements are highly prejudicial and grounds for mistrial (Tr. 49). Defendant interrupted witness, objected and moved to strike and requested the Court to declare a mistrial, and was overruled by the Court, exceptions being allowed. Later in the trial the Court ordered the testimony struck out (Tr. 49) thereby reversing its ruling to that extent but not correcting and eradicating the error. Other matters to which objection and exception was taken occurred in the course of the trial, instructions and argument, and are set out in the Specifications of Error.

The jury returned a verdict for plaintiff for \$8,000 (Tr. 17). Defendant moved that the verdict be set aside, in arrest of judgment, and for a new trial. Memoranda of authorities were submitted by both parties, no oral arguments were made, and on April 4, 1921, the Court overruled all of said motions, to which rulings defendant's exceptions were allowed (Tr. 31).

Thereupon, in due course, the defendant brought this cause up for review upon Writ of Error.

SPECIFICATIONS OF ERROR.

(These Specifications are arranged in chronological order of the Errors assigned. In the Arguments appearing after these Specifications, each Argument covers one subject, as near as possible, and the one or several Specifications concerning that subject.)

I.

The Court erred in overruling (to which exception was taken, Tr. 14) defendant's motion to strike the following clause in paragraph V of plaintiff's complaint "That he has sustained special damages for loss of time by reason of said injuries in the sum of Four and 60-1000 (\$4.60) Dollars per day from June 2, 1920, until the trial of this cause, less said period of seventeen (17) days aforesaid" and in paragraph VI "that by reason of loss of time and loss of wages as alleged aforesaid plaintiff has suffered special damages in the sum of Four and 60-100 (\$4.60) Dollars per day from June 2, 1920, until the trial of this cause less a period of seventeen (17) days" and paragraph 2 in the prayer of said complaint "For the sum of \$4.60 per day from June 2, 1920, until the trial of this cause (less a period of seventeen days), for special damages for loss of time occasioned by reason of said personal injuries sustained."; for the reason that loss of time is, under the Employer's Liability Law of Arizona, an item and element of general damages and is not a separate issue. (Assignments I and II, Tr. 100.)

II.

The Court erred in overruling (to which excep-

tion was taken, Tr. 14) defendant's demurrers to plaintiff's complaint, for the reasons that

(1) The facts set forth show that plaintiff was not employed in a hazardous occupation at the time of the accident, as defined and contemplated by the said Employer's Liability Law.

(2) No facts are stated constituting a cause for special damages on account of loss of time or any other item of special damage.

(Assignments III and IV, Tr. 100.)

III.

The Court erred in overruling (to which exception was taken, Tr. 41) the objection of defendant to, and defendant's motion to strike, the testimony of the plaintiff given upon an offer and in response to a permission of the Court (Tr. 39 to 41), in which testimony the plaintiff stated that he had been told by a former claim agent of defendant, then deceased, in course of negotiations for settlement that "They (defendant company) have them all (employees) insured and just as soon as ever those pictures are developed I will go down and try to settle up with you. . . .," for the reason that the said testimony in relation to negotiations and alleged insurance was incompetent, inadmissible and prejudicial, and said ruling was prejudicial, to defendant and reversible error. (Assignments V, Tr. 101.)

IV.

The Court erred in sustaining the objection of plaintiff (to which ruling exception was taken, Tr. 43) to the request of defendant moving that the

Court order such physical examination of plaintiff as might be found necessary by physicians, to be appointed by the Court, to elucidate the matter in dispute (Tr. 43 and 59), for the reason that plaintiff had exhibited his head and physical condition alleged to be attributable to head injury, in evidence, and for the reason that the Court sustained the said objection of plaintiff upon the ground that the Court had no power to order said necessary examination (Tr. 43 and 59), and said ruling was not based upon any exercise of discretion of said Court to grant or to deny said motion. (Assignment VI, Tr. 101.)

V.

The Court erred in overruling (to which exception was taken, Tr. 44) the motion of defendant that a mistrial be declared because of the testimony of the plaintiff concerning negotiations and alleged insurance, as set forth in Specification III above, for the reason that said testimony so given, and the ruling of the Court denying defendants motion to strike it, were prejudicial to the defendant and prejudicial error that could be corrected only by a declaration of a mistrial by the Court. (Assignment VII, Tr. 101.)

VI.

The Court erred in overruling (to which exception was taken, Tr. 57) defendant's objection to the introduction and reception as evidence of American Mortality Tables by plaintiff, for the reasons:

(1) Plaintiff had failed to bring himself within the class of persons upon whom the mortality tables are based.

(2) Plaintiff had failed to introduce evidence and there was no evidence of permanent injury or incapacity, or impaired earning capacity in the future, either partial or total. (Assignment X, Tr. 102.)

VII.

The Court erred in overruling (to which exception was taken, Tr. 75) defendant's motion, made orally and in writing, after both plaintiff and defendant had rested, to direct the jury to return its verdict in favor of the defendant, for the several reasons stated in said motion (Tr. 73 to 75) and the following:

(1) There is no evidence to sustain a verdict for plaintiff, and the verdict is not supported by the evidence, and is contrary to law.

(2) There is no evidence that plaintiff was engaged in a hazardous occupation.

(3) There is no evidence that the accident was due to a condition of the employment or was not caused by negligence of plaintiff.

(4) The evidence shows that the accident was avoidable, and not caused by any condition inherent in a hazardous occupation.

(5) There is no evidence to support the allegation of plaintiff that he was working in the sample mill or in any other building or place used as smelter or ore reduction works where his occupation was hazardous as defined and contemplated by the Employer's Liability Law.

(Assignment XI, Tr. 103.)

VIII.

The Court erred in overruling (to which exception was taken, Tr. 76) the objection of defendant to argument of plaintiff's counsel to the jury (Tr. 76) "Now, we have asked for ten thousand dollars. You, gentlemen, know that ten thousand dollars today is not worth as much as five thousand dollars was four or five years ago," and in ruling (to which exception was taken, Tr. 76) "I sustain the objection in so far as it contains a statement of the fact by counsel, because it is not proper to state the fact, but I will permit counsel to argue and to ask the jury to determine whether the purchasing power of a dollar today is less than formerly. They may bring to bear their own knowledge and experience in order to determine that. In other words, I think it is the proper matter for them to consider in case they come to the conclusion that the plaintiff is entitled to recover in this action." for the reasons

(1) There were no facts in evidence and no verdict or other basis upon which the jury could make any comparison of values.

(2) The jury were permitted to pass upon matters not in evidence.

(3) The ruling permitted the jury to enhance damages, prejudicial to defendant, without any basis in evidence and upon purely conjecture and guess.

(Assignment XII, Tr. 103.)

IX.

The Court erred in instructing the jury (to which

instruction exception was taken, Tr. 93) as follows:

“I charge you, as a matter of law, gentlemen, that all work in and about mines, ore reduction works and smelters is a hazardous occupation within the meaning of the law. Therefore, if you believe from a preponderance of the evidence that the plaintiff at the time he claims to have been injured, was working in and about open pits, open cuts, mines, ore reduction works, or smelters, he was at the time engaged in a hazardous occupation and that it comes within the meaning of the Employer’s Liability Law.” (Tr. 78.)

X.

The Court erred in instructing the jury (to which instruction exception was taken, Tr. 93) as follows:

“And I further charge you that if he was, at the time, engaged in work in or about open pits, open cuts, mines,—(addressing counsel) I don’t believe you claim under ‘open pits or open cuts’ in your complaint and it is merely that you claim that the work was done in connection with ore reduction works and mining, so I will modify it. I was simply reading it because it was all in one paragraph, not that I think the word ‘quarries’ has anything to do with this case, (addressing the jury) but that all work in and about mines, ore reduction works and smelters, if he was so engaged in that work, he was engaged in a hazardous occupation within the meaning of the law referred to.” (Tr. 80.)

XI.

The Court erred in instructing the jury, (to

which instruction exception was taken, Tr. 94) as follows:

“You are made the judges as to the extent of the injuries, if any, so sustained. It is not for the Court, it is for you to determine that question of fact, that is as to whether or not they are temporary or permanent, in character, and as to what extent, if any, by reason of such injuries only, plaintiff has suffered mental and physical pain and anguish or both, and also as to what extent, if at all, he has been by reason of such injuries disabled, and incapacitated from following his usual or any gainful, profitable occupation, and as to whether or not such incapacitation, if any, is permanent or merely temporary.”

Now, in the ascertainment of damages we pass now from the question of whether or not he was injured and whether or not injury or injuries were permanent and if you find that he was injured, then you must determine, as I said before, the extent of the injuries, and whether they are temporary or permanent, and after you have determined that question, then—and if you do determine that he is entitled to such damages by reason of such injuries, then you proceed to ascertain and determine the amount of damages that should be awarded him.” (Tr.84.)

XII.

The Court erred in refusing to give the following instruction requested by defendant (to which ruling exception was taken, Tr. 93):

“There is no evidence in this case proving the alleged injury was of a permanent char-

acter, and the alleged injury must not be considered permanent by you in the consideration of the case.” (Tr. 95.)

XIII.

The Court erred in refusing to give the following instruction requested by defendant (to which ruling exception was taken, Tr. 93):

“The defendant is not responsible in damages to plaintiff because the plaintiff could not get or did not get work after he left defendant’s employ, or because plaintiff did not get work which he considered he could do. The fact, if such it is found by you to be, that the plaintiff could not or did not get work should be disregarded by you in any consideration of damages, if any, on account of loss of time between the date of the injury and the date of trial.” (Tr. 95.)

XIV.

The Court erred in refusing to give the following instruction requested by defendant (to which ruling exception was taken, Tr. 93):

“I charge you that under the allegations of the 4th paragraph of plaintiff’s complaint the plaintiff could recover, if at all, only upon competent evidence that the work and occupation in which he was engaged at the time of the happening of the accident was in that occupation defined under paragraph 5 of Sec. 3156, R. S. A. 1913, which is as follows:

‘All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground or floor beneath in which the erection, construction, repair, painting or alteration of any building, bridge, structure or

other work in which the same are used.' ''
(Tr. 96.)

XV.

The Court erred in overruling (to which exception was taken (Tr. 31) the motion of defendant that the verdict be set aside as uncertain and not responsive for the reason that the complaint and prayers thereof stated two issues, one for special damage and one for general damage.

ARGUMENT I.

Specifications of Errors I, XIII and XV—Special Damages.

(Matters concerning Special Damages as brought out by the Demurrer and Motion for Directed Verdict will also be considered hereunder.)

Under the practice in Arizona, loss of time has apparently been considered an element to be proved under general damage in actions based upon the Employer's Liability Law, and not as an item of special damages the facts of which must be specially pleaded. Unquestionably a damage which is in fact special must be specially pleaded; if, therefore, loss of time is held to be a special damage then the Arizona practice has been incorrect. The motion of the defendant to strike the attempted allegation of loss of time as special damage was made because of the said practice and because the said allegations in this complaint are not special pleading, in the customary way, of facts showing special damage, but they are attempted pleading of a sep-

arate and distinct issue for special damages in an indefinite sum based upon a sliding scale.

Arizona Eastern R. R. Co. v. Bryan, 18 Ariz. 106:

At page 118, the Court approves an instruction on damages, which includes the element of loss of time.

Arizona Copper Co. v. Burciaga, 20 Arizona 85:

At page 94 the Court includes in the elements of damage recoverable under the Employer's Liability "the reasonable value of working time lost."

Furthermore, the rule stated in *Warner v. Bacon*, (Mass.), 69 Am. Dec. page 259, is "But, as special damage—cannot be recovered unless it is alleged in the declaration, it follows that such damage, sustained after an action has been brought, cannot be recovered at all, unless in a new action, inasmuch as it cannot be alleged and proved before it exists." In the case at bar loss of time was alleged "to date of trial" as a special damage. If it is a special damage then under this rule it can include to date of action only.

Demurrer to Special Damage Allegations.

The complaint did not state any facts constituting a cause of action for special damage on account of loss of time. At the trial it developed that plaintiff had not been able to get, in his locality, the light work that he considered he could do (Tr. 42). There might have been other facts of another nature as to why time was lost, if any. The defendant was entitled to be apprised of the facts if a special damage was claimed. An examination of

the complaint shows that there are no more facts in relation to special damage for lost time than are customarily pleaded for that or any other element of general damage, such as pain and loss of earning capacity. If loss of time is a special damage, then no facts to support such a special damage are pleaded and the demurrer should have been sustained and no recovery for the special damages.

City of Pueblo v. Griffin (Colo.) 15 Pac. 616:

The complaint pleaded "an expense of \$50 for medical services with loss of time in his business." The Court states "The complaint is one for general damages only." "The distinction between general and special damages . . . is well understood The object of pleading being to apprise the opposite party of the nature of the claim against him as well as its extent, it is uniformly held that—if from any peculiarity in the circumstances or situation of the injured party other loss accrued to him thereby, such peculiarity must be alleged and proven." The Court held that no evidence of loss of time should have been admitted.

17 C. J. p. 1014 Note 60 (a):

A complaint alleging that plaintiff since the injury has been unable to do ordinary farm work and that he had been damaged in a certain sum was insufficient.

Motion for Directed Verdict, Affecting Special Damages.

The evidence concerning the loss of time was simply that plaintiff had worked for 17 days, then had

been discharged, that he had not worked to earn wages thereafter, that there was no work of the kind he considered he could do (Tr. 38, 42 and 43). This is manifestly no evidence whatever to support a claim for loss of time as a special damage. The law is stated in 17 Corpus Juris page 781, (quoted below), citing Kentucky and Alabama cases. It is submitted that the evidence in this case was such that admittedly there was ability to earn, if the plaintiff had secured the work he desired (Tr. 42, 43). There is no evidence that he could not have earned as much in the work he was able to do as he was earning in the work he was doing at the time of the injury. There is in fact no evidence of even impaired earning capacity during the period; the uncontradicted evidence shows there was no (Tr. 38, 42,43) inability to follow wage earning work, but admits the plaintiff could at least do light work. The motion for a directed verdict as it affected the issue of special damage should have been granted.

Specification of Error XIII.—Refusal of Instruction on Ability to Get Work.

The defendant requested the Court to give the instructions set out in Specification XIII because the plaintiff had testified that he had for seventeen days, between the date of the accident and the date of the trial, done the same kind of work as before the accident except that it was lighter work “as near as the boss could” (Tr. 38 and 43), and that after his discharge, “there was no light work that I could get around there.” The defendant was in no way responsible for the alleged loss of time due

to inability of the plaintiff to **get** work. The defendant was under no legal or moral duty to give the plaintiff work, though the testimony concerning his discharge was manifestly intended by plaintiff to have the jury so consider (Tr. 38). The testimony about his inability to get work might possibly have been admissible in order to give the inference that the plaintiff was willing to work if he could get it. But certainly, the defendant was entitled to an instruction which would inform and instruct the jury that this inability to get work had nothing whatever to do with damages on account of the alleged loss of time and that the testimony should not be so considered. The law is clear upon that point. The instruction given by the Court (Tr. 84) was "you will also or may also make due and adequate allowance for the reasonable value of the time lost by the plaintiff as a result of such injury or injuries from the date they were so sustained to the present time." There was nothing in this instruction defining or explaining what should be included or excluded in "time lost." It permitted the jury to guess and speculate and in view of the evidence of the plaintiff concerning his inability to obtain work, the jury was free to consider and undoubtedly did consider that the said inability to obtain work was evidence and adequate evidence of time lost. The failure to give the instruction requested or some instruction defining, explaining and limiting the term "time lost" was prejudicial error and especially as there was no substantial evidence of any loss of time due to inability to perform work in a gainful occupation.

“Loss of time as an element of damage means time that is totally lost, due to the fact that the injured party cannot follow any wage earning occupation, as when he is confined to his bed by an injury. It is more than the impairment of the power to earn money, as impairment implies that the injured person can perform some service or follow some wage earning occupation and that his ability to earn money although reduced is not totally destroyed.”

“There can be no recovery for mere inability to find work after the injury as distinct from an inability occasioned by the plaintiff’s incapacitation from labor because of the injury.”

ARGUMENT II.

Specification of Error II.—Demurrers.

In paragraph II of the complaint, the defendant is alleged to have been conducting a smelter and appurtenances in “sampling” as well as “smelting” ore. The allegations recognize that sampling and a sampling mill is a distinct operation and mill from smelting and a smelter. The allegations in paragraph III show that plaintiff was not engaged in a “hazardous occupation in mining, smelting” or “in any other industry” (Sec. 3154 R. S. A. appendix, but that he was employed in a yard crew (appendix), but that he was employed in a yard crew that was in general performing work which had no more connection with the “hazardous occupation in mining and smelting” than does the work of a gardener around the campus of a university which has among its buildings a shop or laboratory where power driven machinery is used. If the words

“works” and “plants” are to be interpreted in the Employer’s Liability Law to mean and apply to all the buildings owned or controlled by an employer which are in proximity to, or on the same tract of land as, a building in which machinery is power driven, or in which a really hazardous industry is carried on, then it is submitted that if work everywhere around the grounds and buildings, where one building is a smelter, is regarded under the law as a hazardous occupation in smelting, it would logically follow that manual work in and about a university which had a building in which there was machinery driven by power would be a hazardous occupation. At least the “hazards” surrounding such manual work about the grounds would be the same in each case. We assume that such work about a university would not be declared to be work “in and about” a “plant,” where mechanical power was used, although such an institution is spoken of as an educational plant. The words in the law should be confined to a reasonable intendment taking the law as a whole in its provisions and avowed object. This Court has decided in the case of *New Cornelia Co. v. Espinosa* (268 Fed. 742) that such a reasonable construction must be given and that the law does not mean, when it says “in and about mines,” that all men employed by the owner are in a hazardous occupation simply because they happen to be about the surface of a mine and “within the lines” of the owner.

There are no facts in this complaint showing that the plaintiff was in a hazardous occupation “in and about” a smelter, giving the words and the term “smelter” a reasonable construction in view of the

whole law and following the reason and spirit of the New Cornelia case in its interpretation of the words "in and about mines;" there is no allegation showing that power was used, or was being used, to operate any machinery in the sample mill, even if plaintiff had been working in said mill, which the evidence showed he was not, or that machinery or power in any way was the cause of or was connected with the accident. It is clear from the facts alleged that the work being done by plaintiff and the place and manner of the accident was not in any sense due to a condition of employment in a hazardous occupation, as contemplated by the law. It was no more work in and about a smelter, or work in a plant where power driven machinery was being used, or affected by any smelting work or use of machinery, than as if the plaintiff had been putting bolts in concrete framework in similar construction work on the ground outside of and on an addition to one of the recitation buildings of a university. The facts show that the plaintiff was engaged in construction work pure and simple, (as facts as distinct from conclusions are alleged in the complaint), was not engaged and had not been engaged in a "**hazardous** occupation in smelting" or in such an occupation within a plant. In order to state a cause of action under the Employer's Liability Law, applicable to construction work, plaintiff would have to bring himself under Sec. 3156, subdivision 5 (Appendix and in Specification XIV *supra*); this he has not done, because the platform was admittedly less than 20 feet from the floor.

Because he was not engaged in a hazardous occupation, and because the accident was not due to

a condition or conditions of employment in a hazardous occupation, as shown by the facts alleged in the complaint, the remedy if any which plaintiff had was under common law negligence as modified by Arizona law, one of the three avenues of redress open to an employee and declared in *Consolidated Arizona v. Ujack*, 15 Arizona, on page 384.

We submit that not only is our position on this point supported by a reasonable and fair construction of the statute, applying legal rules of construction, but this position is that of the Courts, and we have taken it accordingly, as shown in the decisions and reasoning of this Court in the *New Cornelia* case, and of the Arizona Supreme Court in the *Matthews* case.

Arizona Eastern R. R. v. Matthews, 180 Pac. 159;
20 Ariz. 282.

Conroy v. City of Clinton (Mass.) 33 N. E. 525.

Wilson v. Dorflinger & Sons, 218 N. Y. 85.

Guerrieri v. Industrial Com. (Wash.) 146 Pac. 608.

Wendt v. Industrial Com. (Wash.) 141 Pac. 311.

State v. Business Property Co. (Wash.) 152 Pac. 334.

Remsnider v. Union Savings (Wash.) 154 Pac. 135.

Edelweiss v. Industrial Com. 125 N. E. 260.

These cases indicate that the courts have construed clauses in the light of the object of the whole law and have limited the clauses to a reasonable construction instead of giving a possible but manifestly too wide a definition of terms:

In the **Wilson** case, New York, the Court held that an elevator was not under a clause defining as hazardous the "operation otherwise than on tracks on streets, highways or elsewhere, of cars, trucks, wagons or other vehicles...propelled by steam, gas, gasoline, electric, mechanical or other power."

Of the three Washington cases:

In the **Wendt** case a carpenter for a department store was killed in turning on an electric switch in a shop maintained for repair of vehicles used by the store and in connection with it. It was contended that the employer must be shown to be engaged in hazardous work in respect to his whole business. The law made work in a workshop hazardous. The Court held that if an employer conducted any department of business as hazardous, his employees therein would come within the law, even though the principal business was non-hazardous.

In the **Guerrieri** case the law defined "mill" as "any plant, premises, room or place where machinery is used." The Court held that "There was no purpose to cover the operation of an ordinary...elevator or recognize it as...hazardous...or inherently dangerous."

In the **Remsnider** case the defendant, owner of an office building, contended that the work of a janitor was hazardous where he

had gone into an elevator shaft to wash walls and was injured by elevator. Contention was based upon *Wendt* case. The Court states that its decision in that case was on the plain fact that the deceased met death in attempting to operate driven machinery in a workshop in connection with his regular employment; that the Act does not imply that every place in which power driven machinery is employed impresses a hazardous character on work performed in such places; that though the employment of plaintiff at times was hazardous, it was not one inherently and constantly hazardous.

In *Edelweiss v. Commisson* it was stated that an injury from a hazard to which the employee would have been equally exposed otherwise does not arise out of the employment; the causative danger must be peculiar to the work incident to the character of business.

This Court is familiar with the *Matthews* case, as shown by comments thereon in the *New Cornelia* decision. In that case the reasoning distinctly shows that an employee must show employment in a hazardous occupation in smelting, railroading and the like and the accident must be due to a condition or conditions of such hazardous occupation. It shows clearly that not all occupations in railroading are hazardous under the terms of the law. In passing, attention is invited to the statements on page 287 in reference to the word "plants" as it appears in the law. The Court recognizes that the term is necessarily to be defined. "If the freight depot and platform, in which was the opening that appellee fell into, was a **plant** "by which the railway business" of appellant was in part

operated...we submit, without so deciding, that his occupation might be one of those intended to be declared...hazardous." At page 288, in speaking of the occupations declared hazardous by the law, the Court states "Labor in any of the named occupations must mean actual physical contact with the dangerous instruments and means used in carrying on the business." At page 290, in interpreting Sec. 3155, the Court said: "It will be noted that stress in this definition is placed upon 'the means used and provided for doing the work in said occupation.' In fact, the dangerous 'nature and condition' of the occupation is not alone because of the work, but because of the lethal character of the means employed to do the work required of the employee. The nature and conditions of the occupation, and the means used and provided to do the work therein, are so dangerous and the risks therefrom are so inherent as that accident therefrom is 'unavoidable by the workmen therein.' It would seem that before an employee may recover for injury under this act, it must have occurred while he was at work in his occupation, and it must have been occasioned by a risk or danger inherent in the occupation. Our statute (para. 3158) requires something more than that the 'accident arise out of and in the course of the employment,' an expression common to most of the liability and compensation laws.... Under our statute the work must be hazardous and the injury must have been incurred because of the hazard or danger in the work itself and, because of said hazard, 'unavoidable' on the part of the employee." And at page 291, quoting from New York cases, "Where....the employee's ordinary duties and accustomed

scope of activities do not come exclusively or predominantly within the category of enumerated employments, and only casually and incidentally does he do work fairly falling within that category, his right to remuneration must hinge on a finding that he sustained injury while actually and momentarily doing work named in the statute. If the employer shows that the employee was not so employed when he met with injury, he is not entitled to reimbursement under the statute, even though he at times did work embraced within the statute." The case at bar is precisely the kind of case described and contemplated in this last quotation. The evidence shows plaintiff was not doing work within the statute at the time of injury.

ARGUMENT III.

Specification of Error III and V.—Testimony Regarding Insurance.

In the course of the trial on the direct examination of the plaintiff by his counsel a question arose as to the admissibility of plaintiff's testimony respecting his ability to work. We quote from the record as follows (Tr. p. 38, 39, 40, 41):

PLAINTIFF'S ATTORNEY. "And why didn't you work longer?" A. "They laid me off."

DEFENDANT'S ATTORNEY. "We desire to enter an objection to that on the ground that it was one of the matters stricken from the complaint and it is not proper for counsel to refer to that. It is absolutely immaterial in this case."

PLAINTIFF'S ATTORNEY. "We have a right to show...."

COURT. "I don't know that it was by reason of his being physically incapacitated. I think it goes to that."

DEFENDANT'S ATTORNEY. "Unless he shows that point, I think the conclusion of the witness is not to be taken."

COURT. "He may state whether or not he was able to continue at work."

"I quit by request and got my time; I suppose because I wasn't able to do the work."

DEFENDANT'S ATTORNEY. "I move that that be stricken out."

THE COURT. "No, if he don't know positively, don't state an opinion, that may be stricken."

The WITNESS. "Well, I can tell what was said to me by the authorities if that will do any good."

The COURT. "Well, you may tell that."

The WITNESS. "The timekeeper—Mr. Wright told me that the timekeeper wanted to see me, so I goes to the office and went in and he said he had orders to lay me off till I felt able to sign the release. He says, 'I will give you this check and that will be all.' That was the check for my half month's work, for the fifteen days, and he give me that check and he says, 'That will be all.' Then I taken the matter up with the claim agent, Mr. Johnson. Well he first ignored me when I went (4) (37) up there and said 'I cannot do anything for you. Dr. Moore pronounced you all O. K.' I

said, 'I cannot help what Dr. Moore pronounced me, my head and neck hurts me worse now than it did at first.' He said, 'You go back to Dr. Moore and let him examine you, and unless he says you are all right you come back here again.' After he said he couldn't do anything for me he turned around and said that. Well, I goes back and seen Dr. Moore again. He examined me again. Mr. Moore said as far as he is concerned himself he pronounced me sound, and I went back home. The next pay-day after that Dr. Moore and Mr. Thompson, the claim agent, came out to my place, and Mr. Thompson suggested that I should go up to the Verde and be examined by that gentleman sitting right there—I have forgotten his name—regardless of Dr. Moore. I told him all right. He said he would take me up and back. I said, 'All right.' I wasn't contrary; I didn't want to be; I didn't care whether they were company's doctors; so I went up there. That doctor proposed that I should go to Jerome next day and have an X-ray picture taken, then he would make a thorough examination of me; so I went, according to that, and they taken the X-ray pictures, and I went in and they give me a thorough examination. Then Mr. Thompson walked over to me after the doctor got through examining me, and he said, 'Littlejohn,' he said, 'I don't want you to think that we ain't to do—that I ain't going to do fair with you. I have no other orders only to treat the men fair.' He says, 'Mr. Kingdon gives me orders to treat his men all fair. They have them all insured and just as soon as ever those pictures are developed I will go down and try to settle up with you, and I don't want you think'—

Mr. FAVOUR. "I object to this. We don't want to prolong this trial. This is kind of a garrulous statement of gossip (5) (38) of what took place and has no bearing on the case. We don't want to keep objecting, but I do object to this long statement of matters that are highly prejudicial and have no bearing on the case, and I ask that the witness be questioned as to the issues involved here."

The COURT. "Any conversation with reference to settlement would not be admissible."

The WITNESS. "I just had one or two more words and I would have been through."

Mr. FAVOUR. "May I ask that that be stricken out, that statement?"

The COURT. "No, it wasn't objected to; it may stand."

Mr. FAVOUR. "Well, I ask particularly that the matters concerning that the company is insured, be stricken out."

The COURT. "No, I deny the motion."

Mr. FAVOUR. "Note an exception to that, please."

The COURT. "The reason for the denial is, that there was no objection to it until after it was all stated."

Mr. FAVOUR. "I couldn't object to that, it wasn't in response to any question. I don't know what is in this witness' mind. If he starts answering a question and rambles off and makes a statement prejudicial to the defendant"—

The COURT. "Well, you heard him when he started to ramble and didn't make any objection."

Mr. FAVOR. "I ask now that it be stricken out."

The COURT. "Well, I deny the motion."

Immediately thereafter the defendant moved the Court to withdraw a juror and declare a mistrial on account of the improper, prejudicial statements as made by the plaintiff, which the Court overruled (Tr. 45). Later on in the trial and after other witnesses had been examined and testified for the plaintiff the Court on his own initiative ruled as follows (Tr. 49,50):

The Court. I find from an examination of the reporter's notes here that this witness, the plaintiff, made a statement to which counsel for defendant objected, in reply to a question or permission of the Court, and therefore, not having (12) (45) been asked for by counsel on either side and not being responsive to the subject he was discussing at the time he was given permission by the Court to proceed with his statement, I think there are certain portions of this that I shall strike out. He proceeded to tell what Mr. Thompson—well, first the witness said, "I can tell what was said to me by the authorities if that would do any good," and the Court said, "You may tell that." I supposed he had reference to whether he—to the matter of his being able to work, and he went ahead to say what Mr. Thompson told him and what the doctor told him and then he proceeded to make a statement which neither the Court nor counsel on either side would have anticipated, and therefore I exclude this portion of his testimony entirely, "Then Mr. Thompson walked over to me after the doctor got through examining me and said, 'Littlejohn, I don't want you to think that we ain't—that I ain't going

to do fair with you. I have no other orders only to treat the men fair.' He says, 'Mr. Kingdon gives me orders to treat the men all fair. They have them all insured and just as soon as ever those pictures are developed I will go down and try to settle up with you, and I don't want you to think' —and then he was stopped. Now all that I exclude because in the first place any discussion by itself with the expectaton of the efforts to make a satisfactory and mutual arrangement for settlement is never admissible in the trial of a law suit. People have a right to settle their differences and to make their peace and to avoid litigation, and any statement made by either party while that is in progress is never admissible in a law suit and is no admission of fault or liability on the part of either, and the question as to whether these men were insured is wholly immaterial in this case. You can readily see why that (13) (46) might be so. In the first place, it might be a case where the insurance could never be collected, the insurance company might be insolvent or they might refuse to pay, many reasons why that is not admissible, and therefore plaintiff's statement which was not called for by counsel on either side, and I didn't anticipate it when I permitted him to make a statement with reference to his physical condition, therefore you will not consider it at all for any purpose. Make up your verdict wholly independent of that statement."

It is submitted that the ruling of the Court in admitting the evidence and the refusal to grant a mistrial and afterwards in striking testimony and then a statement to the jury in the manner and way done amounted to prejudicial error, could not help but

have its influence on the minds of the jury, and influence the verdict of the jury, and is reversible error.

There is no question, under the authorities, that testimony or statements in regard to such insurance should be kept from the jury where they are irrelevant to the case, as here. Even if it were the law, which we submit it is not, that mere striking of the testimony and an instruction to the jury to disregard, were sufficient to eradicate the error, the action of the Court in this case in emphatically overruling the objection of defendant made immediately, and in denying the motion of defendant that a mistrial be declared, were acts which too firmly impressed the minds of the jury with the prejudicial testimony and with the first determination of the Court that the testimony should be allowed to stand, for his belated ruling, granting only part, to eradicate. This statement of plaintiff was not a mere inconsequential matter, it was an error which under the cases, even a prompt and positive ruling by the Court without equivocation would not eradicate in view of the circumstances of its introduction and its prejudicial effect. The emphatic, and even persistent and abrupt, ruling (Tr. 41) permitting the testimony to stand, and the refusal to declare a mistrial, unquestionably emphasized this occurrence and testimony in the minds of the jury, and the action of the Court some time later in simply and routinely instructing the jury to disregard the testimony could not fail to leave the impression that this testimony had been ruled out on account of some doubtful point of law, because this testimony had been given in response to permission of

the Court and the objection had been made by the defendant and at first overruled. All the circumstances and the rulings of the Court, on account of the delay before the first ruling was finally changed, served to emphasize and impress the occurrences upon the jury, instead of tending in any way to eradicate or cure the error.

But the authorities, supported by reason and equity, show that where such information concerning alleged insurance is brought before the jury, the verdict must be reversed unless it is clear that the verdict could not have been influenced, and it should be reversed even though the lower court excluded the testimony and directed the jury to disregard it. In some of these cases, the fact that the injection of the testimony was due to questions asked on plaintiff's side is considered. If this were the controlling point, the case at bar would all the more require a reversal because the testimony was injected under an offer made by plaintiff personally, and under a permission given by the Court to plaintiff to make a statement, and the statement made after plaintiff's offer injected the prejudicial matters more decisively at the responsibility of plaintiff than if his counsel had asked a question. Ignorance of the law would not affect the result. But there was no inadvertence; the whole testimony of plaintiff Littlejohn shows that he was a shrewd and clever witness and that he was aware or had been made aware of the effect that this testimony about insurance might have, and that his offer to make a statement and his statement were deliberate and intentional (Tr. 41, "I just had one or two more words and I would have

been through") and in no sense can the evidence be said to show that the statement was inadvertently made. If the rule were that testimony of this kind is to be held as prejudicial only when brought out by counsel and not when offered and introduced by the plaintiff, a suggestion in advance to the plaintiff by his counsel would be sufficient to get the information in for its effect and without any peril of reversal. We submit that law and justice require a reversal upon the basis of this error alone.

Simpson v. Foundation Co., 201 N. Y. 479.

Iverson v. McDonnell (Wash.), 78 Pac. 202.

Lowsett v. Seattle Co. (Wash.), 80 Pac. 431.

Stratton v. Nichols (Wash.), 81 Pac. 831.

Birch v. Abercrombie (Wash.), 133 Pac. 1020.

Shay v. Horr (Wash.), 139 Pac. 604.

Cameron v. Pacific Lime Co. (Wash.), 144 Pac 446.

Dameron v. Ansboro (Wash.), 178 Pac. 874.

Union Pacific v. Field, 137 Fed. 18.

Waldron v. Waldron, 39 L. Ed. 452.

In the **Simpson** case the positive attitude of the New York Court, that the material point of error is the fact that testimony or statements are brought to the attention of the jury when they are irrelevant to the issue, and any contributory misconduct of the plaintiff is secondary. In that case a witness testified in response to question of plaintiff's

counsel that a certain person represented a liability insurance company. Counsel claimed it was unexpected. Defendant asked for mistrial but this was not acted upon and the Court allowed the evidence to stand. The appellate Court stated that the plaintiff's counsel should have moved to strike and have done all possible to counteract the testimony. At page 490, the Court states "Evidence that the defendant was insured . . . is incompetent and so dangerous as to require a reversal even when the Court strikes it from the record and directs the jury to disregard it, unless it clearly appears that it would *not* have influenced the verdict." Judgment was reversed.

The **Iverson** case is the first of a line of seven decided in Washington, wherein the same rule of decision is adopted and the New York cases approved. This case gives the decision and reasoning which are reiterated in the latter cases. In this case the defendant was asked upon cross examination if he carried liability insurance; some of the questions were stated by the plaintiff's counsel to be for the purpose of testing credibility. The Court, at pages 203 and 204 cites *Manigold v. Black*, 80 N. Y. S. 861 as holding that the **asking** of such a question constituted reversible error where it did not affirmatively appear that it did not affect the verdict, though the Court instructed the jury that they should not regard it; that it is not proper to inform the jury of such fact in any manner.

The Court states further that in the case at bar it is true objection was sustained, but "it had to be done over objection of the defense the urging of which was practically an

admission of the fact;" also that "it is a fundamental principle that testimony should not be introduced which is not pertinent."

"But even in the absence of any authority, and if the question were presented to this Court for the first time as a matter of first impression, we should without hesitancy conclude that such practice was not in conformity with general principles of law, and hinders, rather than aids, the jury in arriving at a just verdict. For the error alleged in this respect the judgment will be reversed."

In the **Stratton** case the plaintiff's counsel asked jurymen if they were connected with any insurance company that insured against loss on account of negligence, and on cross examination of a witness asked if he was not attorney for the company which insured the mill. On objection he offered to prove the witness was such attorney. The objection was sustained. The Supreme Court held this occurrence constituted prejudicial error under authority of *Iverson* case.

In the **Birch** case, the Court at page 1024 states: "While the trial court instructed the jury to disregard testimony (about insurance) he refused the request to discharge the jury from consideration of the case. We think this error. In the nature of the case the striking of the evidence and the instructions to disregard it cannot cure the objectionable effect of the fact being brought to the attention of the jury."

In the **Shay** case, the lower Court instructed the jury that the admission of the evidence in relation to insurance had nothing to do with the case. The Supreme Court at page 605 states: "We have held in (these)

cases that it is improper to either directly or indirectly get before the jury any fact which conveys information that the defendant is insured against loss in case of a recovery against it, and that striking of the answers conveying such information and instructing of the jury not to consider it will not save the error. The authorities are united that error must follow these facts, unless it clearly appears that they could not have influenced the jury." And further "The parties to this action and their liabilities must be determined by the pleadings, and when other parties or other issues are injected, the one so injecting does so at the peril of any judgment he may obtain. The law is too well settled in this and other jurisdictions to permit of further argument." Judgment was reversed.

The ruling of the Court in striking did not cure the error:

In **Union Pacific v. Field**, the Court states that the presumption is that error produces prejudice. It is only when it appears so clearly as to be beyond doubt that the error challenged did not prejudice that the rule that error without prejudice is no ground for reversal is applicable.

In the **Waldron** case the U. S. Supreme Court states:

"Undoubtedly it is not only the right but the duty of a court to correct error arising from erroneous admission of evidence when the error is discovered, and as a rule when correction is so made the cause of reversal is removed, but the curative effect depends on whether error was of such serious nature that it must have affected the minds of the

jury in spite of the correction. In such cases the withdrawal does not remove the effect."

ARGUMENT IV.

Specification of Error IV.—Denial of Physical Examination.

The plaintiff alleges an injury to his head, sustained a few months before the trial. He testified to alleged effects of the injury to his body and other physical conditions. The plaintiff's counsel said to the jury (Tr. 37) "Feel this man's head, gentlemen." and the court said "If any of the jury desire to make a personal inspection you may do so." The defendant, because of this introduction into evidence requested of the Court an examination of the plaintiff's head and physical condition (Tr. 43). The plaintiff objected to an examination by disinterested physicians to be appointed by the Court. The Court sustained the objection and refused to order the examination requested, but restricted it to the head. The reason for this ruling by the Court was clearly shown to have been based upon the belief that the Court did not have the authority to order such an examination as might be necessary to elucidate the matter in dispute. The ruling was not an act based upon, and did not represent, an exercise of discretion on the part of the Court, since the Judge did not consider that he had the authority to exercise discretion (Tr. 57 to 59).

The defendant's point upon this specification is that the evidence shows that the plaintiff was endeavoring to recover damages for a physical condition due to alleged injuries to his head, that his

testimony related to the alleged effect of injuries to his head upon his body, nerves and physical condition, that by the offer of his counsel to the jury as shown above quoted he placed in evidence the condition he had testified to, not the mere externals of his head, and the defendant was therefore entitled to an examination to the extent that might be reasonably necessary to ascertain the injuries to his head and whatever condition might be found to be a result of the said injuries. There is no question that, in the absence of a statute requiring it or an offer of the head into evidence the Federal Court, under its rulings would have no power to order an examination if the plaintiff objected; although there is now a statute of Arizona authorizing examinations. The theory of the Court in refusing such examination was based upon the belief of the judge that he lacked the power to order it. We contend that he did have the power, in view of the offer into evidence, and that his ruling was in error because it was based upon a misapprehension of the power of the Court under the circumstances. The ruling was not based upon an exercise of discretion, as is plainly indicated by the statement of the judge (Tr. 57), "In the absence of an authority on the subject, I think I will be compelled on objection of the plaintiff to restrict the examination," and (Tr. 59), "Well, I haven't any authority to grant that permission. He is the only man that can, and he denies that authority through his counsel.'

Chicago & Northwestern R. R. v. Kendall 167
Fed. 62.

Denver vs. Roberts, 96 Pac. 186.

Holton v. Janes, N. M. 183 Pac. 395,
17 C. J. 1056.

In the **Kendall** case, (CCA 8th) the plaintiff voluntarily exhibited his knee in open court for examination by the jury. The Court at page 71 states that having done this "it is beyond his power to arrest the investigation." The defendant and the Court were entitled to "any agency in its examination which would aid in the determination of the issue on trial." "It is subject to any legitimate examination and test which will elucidate the matter in dispute."

In **Holton v. Janes** plaintiff was being questioned about a hole in his head and was asked "What part of your head, let the jury see it." Defendant asked for examination of parts exhibited. The Court denied, giving no reason. Plaintiff had also claimed injury to vision but had not exhibited the eye except as he exhibited his head. The Court on review at page 397 said: "It is a matter of common knowledge of which courts will take notice that the question of impairment of vision is capable of exact determination, and in this case when the plaintiff put his head in evidence and permitted the jury to examine it, unless the eye which he complained of as being injured was put out, the jury could in no manner determine the extent of the injury to it, if any, but with the aid of experts the matter was capable of exact determination. For the reasons stated the case is reversed."

In **Denver v. Roberts**, the Court holds that when the trial court has discretion, but denies on the ground it has not the power, this is error.

ARGUMENT V.

Specification of Error VI.—Admission of Mortality Tables

There is no evidence showing the applicability of the mortality tables to the plaintiff. The Court recognized this, when in submitting the tables in evidence, the judge (Tr. 56) stated that he should charge that the injuries must be found to be permanent before the tables could be of any effect and "I should also state the class of persons of whom that table is made or from whom it is made and ask them to find in the first place whether or not he comes within that class and if so then they may consider the tables." But this instruction was not given, and the jury was not told that they should first determine whether the plaintiff belonged to the class indicated. There was no evidence whatever that he came within the class of which the tables are made up; and such evidence is required. On the contrary it was the contention of the plaintiff that he was in a hazardous occupation which is a totally different class.

Kerrigan v. Penn. R. R., 44 Atlantic 1069.

Rooney v. N. Y. N. H. & H., 53 N. E. 435.

City of Friend v. Ingersoll, 58 N. W. 281.

There is no evidence, even assuming the truth of all evidence, of permanent injury, which is a condition precedent to the admission of such tables (United Verde v. Koso, CCA 9th, not yet reported). It is not a question for the jury simply because the permanency of the injury is alleged; there must be

evidence, which, if credible, would warrant a finding of permanent injury to a reasonable certainty before this question can be submitted to the jury or before mortality tables are allowed to be introduced in evidence. The Court has the same province to determine whether there is substantial evidence, before admitting such tables, as it has to determine whether there is evidence sufficient to support a verdict when a motion for directed verdict is made. The lower Court in this case did not determine whether or not there was any evidence of permanent injury. The Court took the position that it had nothing whatever to do with that question but it would be for the jury to determine whether there was evidence. (Tr. 56 and 84). We submit, upon the authority of the cases cited that this position is erroneous, and that to permit the jury to pass upon the question of permanency where the evidence, even if its credibility is assumed, is not evidence to a reasonable certainty, is prejudicial error, and contrary to law and equity.

We further submit, that far from being any evidence to a reasonable certainty of permanent disability, the most that could be said about the testimony of the plaintiff's physician was that he "could not say." If such testimony, its truth being granted for this argument, can be regarded as evidence of permanence, then we fail to see where there is any distinction between temporary and permanent injury, and it would appear that all that is necessary for the plaintiff to recover for permanent injury is to refuse an impartial examination and then have testimony introduced that his condition is doubtful with respect to whether or not

it will clear up, a statement impossible of refutation in any case. The plaintiff's physician in this case said nothing whatever about permanent injury on his direct examination. Upon cross examination in answer to a direct inquiry he testified (Tr. 45 and 46) that the general tremor was only a symptom and "I think it will continue in a man of his age," later qualifying this testimony (Tr. 47): Q. "Won't that clear up?" A. "I cannot tell." Q. "Wouldn't you say in your opinion it will clear up?" A. "I wouldn't say at his age, that tremor."

The only testimony in regard to the question of permanent disability was that of Dr. Moore, defendant's witness, who had treated the plaintiff (Tr. 63). "I do not believe there will be any permanent disability resulting from his injury," and of Dr. Southworth, defendant's witness (Tr. 71), "Knowing what I do, I would say that certain temporary physical conditions have resulted from Mr. Littlejohn's injury."

The injury to the plaintiff had occurred only a few months before the trial and his own testimony and that of his physician showed that even the external wound or cut had hardly time to heal (Tr. 44). Naturally the other effects from the wound would not then have had time to clear up and a physician could easily be doubtful as to what might be the ultimate result. But such doubt, shown by the physician's testimony (Tr. 47), in this case. "I cannot tell, I wouldn't say at his age" is not that evidence to a reasonable certainty which is the rule of what is necessary in order to support a case of damages for permanent injury. To allow a

jury to pass upon the question whether or not there is permanent injury in such a case where there is no substantial evidence and the physician's opinion is speculative, uncertain and manifestly no opinion whatever as to permanency, is clearly allowing the jury to speculate and guess upon speculative and uncertain testimony of the physician. And the plaintiff himself is certainly not competent to give, and did not give in this case, any testimony in relation to the permanency of his injuries under such circumstances. We submit to the Court that to permit the jury to determine the issue of temporary or permanent damages where the evidence of permanent injury, if credible, is not to a reasonable certainty, denies the defendant his rights and due process of law the same as if the case is submitted to the jury where the evidence as a whole is not sufficient to sustain a verdict. And the admission of these tables and the instruction of the Court (Tr. 88), "They are introduced upon the theory that the evidence in the case has shown that the injuries were permanent" erroneously permitted the jury to believe that the evidence, if credible, could be considered proof of permanent injury to a reasonable certainty.

Leach v. Detroit Co., 84 N. W. 316.

Tenny v. Rapid City, 96 N. W. 96.

Texas and N. M. Ry. Co. v. Douglas, 7 S. W. 77.

City of Honey Grove v. Lamaster, 50 S. W. 1053.

Stevens v. N. J. R. R., 65 Atlantic 774.

Klein v. Phelps, 135 Pac. 226.

Also Authorities, Argument VIII.

In **Leach v. Detroit** mortality tables had been introduced and on appeal it was contended they were erroneously admitted because there was no evidence the injuries were permanent. The plaintiff contended that the testimony of his physician showed the injuries were permanent. The Court stated that under any fair interpretation of his testimony it falls short of showing permanent character of injury. The cases of **Sax v. Detroit Co.**, and **Mott v. Detroit Co.**, are cited as holding there was not evidence of permanent injury and the tables were erroneously admitted. The judgment reversed.

In **Tenny v. Rapid City** the Northwestern Tables were admitted over objection of defendant on the ground of no proof of permanency of personal injury. The Court states that there was no evidence that plaintiff was permanently injured and might not recover and the admission of the tables was erroneous and constituted prejudicial error.

In **Texas Mexico R. R. v. Douglas**, plaintiff had a permanent injury to his hand but the judgment was reversed because tables were admitted. The case shows the rule in Iowa and Texas to be that the tables are admissible when the evidence tends to show entire destruction of earning capacity, or when death results, but they are not admissible where the disability is only partial.

In the **Snyder** case, the Court at page 706 states:

“In the course of the trial the Court permitted the introduction of mortality tables to

show the expectancy of life of the plaintiff. It is argued by the defendant that this was error, because it was not shown that the plaintiff was permanently injured.. We think this position must be sustained. The most the evidence showed was that the plaintiff developed a neurasthenic condition after his injuries. He testified that since his injuries he has been required to walk with a cane, and with a limp or dragging of the foot. But we think there was no evidence of the fact that this dragging of the foot or limping was the result of the injuries which he received at the time of the accident. None of the doctors testified, so far as the record shows, that the natural and reasonably probable result of the injuries which the plaintiff received at the time of the accident would be a permanent injury. The Court therefore erred in receiving these mortality tables in evidence."

In **Stevens v. N. J. R. R.**, it was held that where the verdict is large and the trial has occurred so soon after a surgical operation that the physicians could not determine whether there would be complete or partial recovery. A new trial should be awarded.

ARGUMENT VI.

Specifications of Error VII., IX., X., and XIV.—

Motion for Directed Verdict, Instructions on Hazardous Occupations.

The request for a directed verdict raises the question whether there is substantial evidence sufficient to sustain a verdict, and the denial of the motion subjects the evidence to review on error.

Under the Employer's Liability Law of Arizona the plaintiff is required to allege and sustain by evidence that he was employed by the defendant in an occupation declared to be hazardous and while engaged in the performance of the duties required of him was injured and the injury was caused by an accident due to a condition or conditions of such employment and was not caused by any negligence of the plaintiff. (*C. & A. Co. v. Chambers*, 20 Ariz. 54).

Plaintiff alleged that he was working at the time of the accident in a sample mill of the defendant but his proof failed to show this. He himself testified (Tr. 36) that he was working on concrete construction which was an addition and outside of the sample mill (Tr. 60), that was one of the buildings situated on the ground owned or controlled by the defendant. The plaintiff was not working in any building, either a smelter or a sample mill or any other kind. He was working on the outside where there was no power operated machinery, and no mechanical power. He was engaged not even in repair work, but upon ordinary concrete construction work in the course of construction of a new piece of work that was not being used and had not been used in connection with the operation of any smelter or any other industry. The accident was not due to any condition, hazardous or otherwise, of a smelter, mill, plant, machinery, mechanical power or any other condition or thing due to a hazardous occupation or to any condition, avoidable or unavoidable, of employment in a hazardous occupation in mining, smelting or any other industry. The plaintiff stepped upon a board or plank which was

one of three placed across the aisle of concrete. The plaintiff knew the board was only two inches thick (Tr. 37); he knew that there were two other men on the plank when he stepped on it (Tr. 44). The evidence shows that the plaintiff had been working for several years on construction and other work of a nature where a reasonable and prudent man is supposed to have, or at least is expected to acquire, that amount of practical sense which will give him at least a reasonably due sense of proportion as to the strength of stagings which are temporarily used in construction work. The plaintiff had stepped with a heavy bolt upon a 2 in. by 12 in. plank placed across a ten-foot aisle, when he saw two other men each with a heavy bolt already standing on the plank. If it can be said that a man of this experience and under these circumstances exercised the care a reasonable and prudent person would exercise, especially when there were two other planks there upon which to step, then it would seem that the legal term or clause "care a reasonable and prudent person would exercise," means little or nothing in practical use. The Supreme Court of Arizona has recently held (*C. & A. Co. vs. Gardner* 21 Ariz. 206, 187 Pac. 563) that an employee who reached around a beam to turn off an electric switch and came in contact with electrical current, was negligent and no recovery could be had under the Employer's Liability Law. At page 215 the Court said, "Can it be said that a reasonable and prudent person, under the existing circumstances, would have done as he did? Or would not such a person have done as the evidence shows that the deceased had always done before, looked into the

face of the switch and aided his hand with his eye.” In this case would not it have been the duty of a reasonable and prudent person to have kept off the plank when he knew and saw that there were two other men on it and when there were two other planks upon which to step? (United Verde Extension v. Koso.)

But even if the actions of the plaintiff were what a reasonable and prudent person would have done, how can the evidence be held to show that it was an “inherent” risk and hazard, unavoidable and due to a condition of the employment in a hazardous occupation. This accident was no more due to an inherent risk of a hazardous occupation “**in** mining smelting” or in some place where power driven machinery was used, than it would have been if the accident had occurred on the same kind of construction work situated miles away from any place where mining and smelting was carried on. The law does not state that the work of **constructing** a smelter or of **constructing** an instrumentality or building to be used directly or indirectly in connection with a smelter is ipso facto hazardous. It certainly is not the meaning of the law that all work on ground owned or controlled by an employer who is engaged in mining or smelting business is hazardous or that accidents which happen on such ground are ipso facto in hazardous occupations. The case of Arizona Eastern vs. Mathews and of New Cornelia Company vs. Esipnosa, 268 Federal 742 decided by this Court, show that the Court will construe the law as a whole to effectuate its apparent purpose to protect those employees who sustain injury while engaged in a hazardous occupa-

tion or occupations in mining and smelting and railroading and not to include all employees or all accidents which occur on the property on or in which mining, smelting and railroading is being conducted.

The lower Court based its instructions upon its interpretation of simply one clause of the law (Section 3156, Paragraph 8), overlooking the provisions of Section 3154 which state the very purpose of the law, quoting verbatim from the constitution, to "protect the safety of employees in all hazardous occupations in mining, smelting" and Section 3155 which explains the risks and hazards which are intended to be covered in the occupations enumerated in Section 3156, shows that inherent and unavoidable risks are contemplated; "by reason of the nature and conditions of, and the means used and provided for doing the work in said occupations, such services especially dangerous and hazardous to workmen therein, because of the risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein." The instructions of the Court (Specifications IX and X) do not state the law as it has been interpreted by this Court in the New Cornelia case. The only conclusion which the jury could draw from these instructions was that if the plaintiff was doing any kind of work around a mine or smelter (that is within the lines of the employer's ground) that was a hazardous occupation according to law and they had no right to find as a fact that work of some kinds around mines or smelters might be non-hazardous and might not be a hazardous occupation "in mining" as provided in Sec. 3154. To illustrate, we submit that these instructions, if they

were applied to the New Cornelia case, would have compelled the jury to find that the accident to the plaintiff therein was due to a hazardous employment because of the fact that it occurred within the lines of the defendant company. But this Court states at page 749 "the risk or hazard which the deceased incurred in being near the fire on the surface was not a risk or hazard inherent in the work in the mine, and in doing of that work the risk or hazard was avoidable by the deceased." Further, if it were assumed the instructions objected to were correct as general statements of law, there are no facts in evidence to support a finding by the jury that the plaintiff was in a hazardous occupation and that the accident was due to a condition inherent in a hazardous occupation in smelting, or in any other industry declared hazardous, or was due to a condition of employment in a hazardous occupation.

The defendant therefore submits that the evidence shows that the plaintiff was not engaged in a hazardous occupation in mining or smelting or where power was used, that the evidence shows he was at the time engaged in construction work on a building or work that was not completed and was not a part of any "works," "plant" or other mill, and that under the facts the plaintiff could have recovered if at all under the Employer's Liability Law only by bringing himself under the clause of the law set forth in Specification XIV, which his facts did not do, and the Court erred in refusing to give that instruction requested by defendant, and in giving the instructions quoted in Specifications IX and X.

Authorities cited under Argument II.

Crowell Bros. v. Panhandle Co., 271 Fed. 130:

Where there has been a motion for directed verdict the appellate court will review to determine whether there is substantial, or sufficient, evidence to sustain the verdict.

Milm v. Hussey, 155 N. Y. S. 860.

Conroy v. Inhabitants of Clinton (Mass) 33 N. E. 525:

This was an action for death while laying pipe at bottom of sewer by caving of walls. Verdict directed for defendant. Question on appeal was whether the case was within the clause of the statute reading "By reason of any defect in the condition of the ways, works or machinery connected with or used in the business of the employer." The Court cites *Howe v. Finch* which held that the statute did not apply to ways or works in process of construction. The plaintiff in the *Howe* case was injured by fall of the wall of a building in process of construction and which had never been used in defendant's business, though intended to be used. It was held that the case was not within the statute; *J. Smith*, after citing statute: "Does that mean partly made ways which may be very insecure when in process of construction?" "No, it means to give him a right of action when the contemplated works are connected with or used in the business." Ways means the ways used in the business, not partly made ways, not used. If this be so as to "ways" it is so as to works. I think that "ways, works" etc. mean the existing and completed works.

ARGUMENT VII.**Specification of Error VIII.—Argument on Value of Dollar**

The objection to the argument on the present value of the dollar compared with past value seems to us against irrelevant and prejudicial statements. There was nothing whatever in the evidence upon which the jury could base such a comparison. The only possible basis would have been a verdict that had been allowed in the past, and this was not only not in evidence but could not properly have been admitted in evidence or brought into the argument. The jury would naturally form their estimate of a verdict in terms of the value of the dollar at the time of the trial. The only possible effect of the argument which generalized upon an unsworn statement, "that ten thousand dollars today is not worth as much as five thousand dollars was four or five years ago," was to encourage the jury to add a further sum, based upon conjecture and guess, to the amount which they would estimate according to the current value of the dollar in any event. The argument submitted on this matter permitted the jury to award an increased sum for which there was no evidence or basis, as a gratuitous and wholly unwarranted and unsupported addition to any damages they might otherwise have awarded.

Hurst v. C. B. & Q., 10 A. L. R. 174.

Union Pacific v. Field, 137 Fed. 18.

Waldron v. Waldron, 39 L. Ed. 452.

The following is a Note under the Hurst case:

The following authorities are in substantial accord with the earlier decisions in supporting the general rule that in comparing present and past verdicts for similar personal injuries, the difference in the purchasing power of money, or as it is commonly called, the increase in the cost of living at the present time as compared with power at the time prior awards were made, may be taken into consideration.

(This shows the application to a **comparison** between verdicts, in determining the question of excessive verdicts. The comparison is impossible when an argument is made to a jury as there are no facts or past verdicts in evidence.)

In **Union Pacific v. Field**, the Court at page 15: "It is the duty of the court . . . to prevent the jury from the consideration of extraneous issues, of irrelevant evidence . . . and to assure the litigants a fair and impartial trial. . . . A trial is not fair and impartial in which a discussion of irrelevant issues, a statement of a persuasive but immaterial fact, or the assertion or insinuation of an erroneous view of the law or of the wrong measure of damages by counsel in his address to the jury, may have had an influence favorable to his client." At page 17 the Court quotes statement made to the jury by counsel "I say to you on my own behalf, however large a sum of money the \$20,000 . . . may be, that would not compensate me." The Court said "he stated a fact which there was no evidence to prove, and which it would have been a fatal error to have admitted testimony to establish—the fact that

he would not be willing to receive an injury like that of plaintiff for \$20,000."

"Counsel in their arguments are bound to keep within the limits of fair and temperate discussion. The range of that discussion is circumscribed by the evidence in the case. Any violation of this rule entitles the adverse party to an exception which is as potent to upset a verdict as any other error committed."

ARGUMENT VIII.

Specifications of Error **XI.** and **XII.**—Instructions on Permanent Injury

These specifications have reference to the question of evidence of permanent injury. The position has been stated in the Argument V. above. There must be evidence upon which the jury might find, if the evidence were credible, to a reasonable certainty, the permanence of the injury and disability complained of before the question of whether or not they are permanent can be submitted to the jury. The position of the lower court on this question was that the judge was not required to determine whether or not there was evidence of permanent injury or disability but that the jury was the sole judge of whether or not there was any such evidence and if there was any whether or not it was sufficient to sustain a verdict for permanent injury. The instruction given by the Court (Specification XI.) and refusal to give the requested instruction (Specification XII.) is er-

roneous for this reason, as well as because there was no evidence of permanent injury to warrant submission of the question to the jury or to sustain a verdict for permanent injury. Furthermore, there was absolutely no evidence that the plaintiff's earning capacity for the future had been either partially or permanently destroyed. That there must be evidence to support such allegations, when made, is indisputable law (*W. U. Tel. Co. v. Morris*, 83 Fed. 994); but in this case there was not even an allegation in the complaint of any future decreased earning capacity (Tr. 5). Yet, this instruction, without there being any allegation in the complaint or evidence in the case, directed the jury to determine whether or not there was permanent loss of earning capacity. The amount of the verdict in itself proves that the jury included an assumed loss of earning capacity, as they were authorized by the instructions to do, although there was no evidence whatsoever of even probability of any such loss.

White v. Milwaukee, 21 N. W. 524; 50 Am. Rep. 154.

Meeter v. Manhattan, 75 N. Y. S. 561.

Filer v. N. Y. C. 49 N. Y. 43.

Tweedy v. Inland Brewing Co., 134 Pac 468.

W. U. Tel. v. Morris (C. C. A. 8th), 83 Fed. 99.2

Snyder v. Great Northern, 152 Pac. 703.

Pollock v. Pollock, 71 N. Y. 140.

Strohm v. N. Y. Lake E. & W., 96 N. Y. 304.

Main v. Gr. Rapids R. R., 174 N. W. 157.

Ayres v. D. L. & W. 158 N. Y. 254.

U. S. C. I. P. v. Eastham, 237 Fed. 185.

Gifford v. Washington Water Power Co., (Wash)
148 Pac. 11.

McNeill v. Interurban Co., 92 N. Y. S. 767.

17 Corpus Juris, page 1035, Permanency and Future Consequences:

“Testimony of a physician as to the probable effect of the injury is admissible, but it should show that such result is reasonably certain and not a mere likelihood.”

In the **Gifford** case two physicians testified for plaintiff. In answer to a question one physician testified “A. I would probably expect paralysis, convulsion—or convulsions, or severe periodical pains in the head, and possibly— Q. Leave out the word ‘possibly,’ Doctor, I don’t care about that. A. All right. Q. Just what in your opinion you would expect, quite possible? A. General nervousness.” And on cross examination “Q. Yes, but you as a doctor would not say to this jury that it is your opinion that there ever will be an injury to the brain. A. Well, I could not say that in my opinion that there would not be either.”

The Court at page 13 “It is apparent from the whole testimony of the doctors that neither of them intended to say that any serious results were reasonable certain to appear from this head injury. The rule is well settled by numerous decisions that future consequences which may presently be recovered for must be such consequences as

are reasonably certain to ensue. . . . We are satisfied that this is the correct rule (citing the *Strohm* case) and also that the conclusions of these two physicians were clearly speculative, and had reference only to possible consequences and not to consequences that are reasonably certain to accrue." It was held that the court erred in permitting the evidence to be considered by the jury. The judgment was reversed for this and another error.

In the *Strohm* case a physician testified that the injuries would very likely be permanent "I mean that the boy will always have some reminder of it, some remnants of this injury, great or small that is certain; how much he will retain I cannot tell, but I think it very likely he will retain." The Court at page 305 "Future consequences, which are reasonably to be expected to follow an injury, may be given in evidence for the purpose of enhancing the damages to be awarded. But to entitle such apprehended consequences to be considered by the jury they must be such as in the ordinary course of nature are reasonably certain to ensue. . . . It is not enough that the injuries received may develop into more serious conditions than those which are visible at the time of the injury nor even that they are likely to so develop. To entitle a plaintiff to recover present damages, for apprehended future consequences, there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury." Judgment was reversed.

In *Main v. Grand Rapids*, the complaint alleged permanent disfigurement and future

great bodily pain. Defendant claimed that the Court in its charge in effect authorized the jury to award damages for permanent injury of which there was no proof to a reasonable certainty. Charge was "if you find the nervous system impaired . . . you will consider how long such condition may continue as far as the evidence shows." The higher Court states "The instruction should be confined to such damages as are proximately shown by the evidence, with reasonable certainty, to result. Only such future damages are recoverable as the evidence makes reasonably certain will necessarily result from the injury."

In **White v. Milwaukee** the plaintiff introduced testimony that she had not recovered from the injury and it might be permanent. The Court states "A mere possible continuance of disability by reason of an injury is not a proper element of damages to justify a jury in assessing damages for future or permanent disability, it must appear by the proofs that continued or permanent disability are reasonably certain to result. "It is fair to assume that the jury predicated their assessment of damages in part upon the possibility of permanent injury. This is error." Judgment was reversed.

In the **Meeter** case plaintiff's physician was asked "Can you say with reasonable certainty whether this injury is likely to be permanent?" He replied "It is likely to be permanent in the sense that it will improve somewhat but she is not likely to ever get entirely over it." The lower court charged "If you consider she is permanently injured you may award compensation for that. When

I say 'if you consider' I mean if you consider from the evidence." The appellate court says "In view of what preceded it is evident that sufficient weight was not given to the true rule that should be applied in regard to giving damages for permanent personal injury in cases of this kind. In the reception of evidence and in the efforts made to exclude what was regarded by defendants as incompetent and in the charge of the court the effect was to some extent to permit the jury to understand that they were at liberty to award damages for injuries which were likely to be permanent, instead of confining their verdict to damages for such injuries as would with reasonable certainty be permanent."

In the **McNeill** case the Court reviewed the evidence and reversed the judgment because it submitted to the jury the question of permanency of the injury.

In the **Ayres** case the plaintiff's knee and spine were injured and she was wearing a brace at time of trial more than two years after. Her doctor testified that her condition would continue more or less as long as she lived. The testimony was given after asking the physician if he could state with reasonable certainty. The defendant requested an instruction that "upon the evidence there was no ground upon which the jury could find any future damages in reference to injury to the knee." This was refused. The Court at page 261 "There was no request to charge that the jury could not find any permanent damages, with reference to the knee, but simply that they could not find any future damages." Further, that the evidence showed that plaintiff would suffer

more or less in the future owing to the condition of her knee which was not yet well, and while the future inconvenience might be slight and of short duration "the defendant was not entitled to have it altogether withdrawn from the consideration of the jury, or to the instruction "that the jury could not find future damages."

(The manifest inference is that if the defendant had asked an instruction that the jury could not find **permanent** damages it should have been given.)

In the **Eastham** case the complaint alleged that injuries permantly rendered plaintiff less able to work; there was no evidence tending to show to what extent the disability would decrease earning power. The Court states that unless the jury's attention had been called to the fact it could not assess substantial damages for decreased earning capacity shown by the physician's testimony, "it might well be, and probably is a fact that the jury took this into consideration in arriving at the amount." "The jury is not allowed to invade the realm of supposition to arrive at the compensation to be awarded the plaintiff for this element of damages." New Trial, ordered.

In conclusion we respectfully submit to this Court that each of the eight Arguments constitute error or errors on the part of the trial court, which were prejudicial to the rights of the defendant and were reversible error at law. The judgment of the

trial court should and ought to be reversed and its judgment ordered to be entered dismissing the cause.

Favon & Baker

Attorneys for Plaintiff in Error.

APPENDIX

Revised Statutes of Arizona, 1913

Sec. 3153. This chapter is and shall be declared to be an employer's liability law as prescribed in Section 7 of article XVIII of the state constitution.

Sec. 3154. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said section 7 of article XVIII of the state constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

Sec. 3155. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and haz-

ards which are inherent in such occupations and which are unavoidable by the workmen therein.

Sec. 3156. The occupations hereby declared and determined to be hazardous within the meaning of this chapter are as follows:

* * * * *

(5) All work on ladders or scaffolds of any kind elevated twenty feet or more above the ground or floor beneath in the erection, construction, repair, painting or alteration of any building, bridge, structure or other work in which the same are used.

(8) All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters.

(10) All work in mills, shops, works, yards, plants and factories where steam, electricity, or any other mechanical power is used to operate machinery and appliances in and about such premises.

Sec. 3158. When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured then the employer of such employee shall be liable in damages to the employee injured, or in case death ensues, to the personal representative of the deceased for the benefit of the surviving

widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and, if none, then to his personal representative, for the benefit of the estate of the deceased.

Sec. 3159. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times, regardless of the state of the evidence relating thereto, be left to the jury, as provided in section 5 of article XVIII. of the state constitution; provided, however, that in all actions brought against any employer, under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

No. 3703

3

**UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,**

Plaintiff in Error,

vs.

JOHN T. LITTLEJOHN,

Defendant in Error.

BRIEF OF DEFENDENT IN ERROR

**Upon Writ of Error to the United States District
Court in the District of Arizona**

**O'SULLIVAN & MORGAN, of Prescott, Arizona,
Attorneys for Defendant n Error.**

Filed this.....day of....., 1921.

.....
Clerk U. S. Circuit Court of Appeals.

Service of copy of withn Brief is acknowledged
this.....day of September, 1921.

.....
Attorneys for Plaintiff in Error.

FILED

SEP 19 1921

No. 3703

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED VERDE EXTENSION
MINING CO., a Corporation,
Plaintiff in Error,

vs.

JOHN T. LITTLEJOHN,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

In conjunction with opposing counsel, we shall designate the parties "plaintiff" or "defendant," as they appeared in the Trial Court.

SUPPLEMENTARY STATEMENT OF FACTS.

Plaintiff (defendant in error) desires to make the following supplementary statement of facts, viz.:

Par. II. of Plaintiff's Complaint (Tr. p. 2)
alleges:

"That heretofore, to wit, on the 2nd day of June, 1920, and for a long time prior thereto, in the Verde Mining District, County of Yavapai, State of Arizona, the defendant corporation was the owner of, and was then and there operating and conducting a certain smelter and ore reduction works, together

with all appurtenances thereto belonging or in anywise appertaining, in the sampling, treating, reducing and smelting of ores and minerals. That defendant's said smelter and ore reduction plant, together with its appurtenances, did then and there consist of smelters, mills, shops, works, yards, plants and factories where steam, electricity and other mechanical power was then and there used to operate the machinery and appliances, in and about said smelter and ore reduction works and appurtenances aforesaid."

Par.III. of Plaintiff's Complaint (Tr. p. 2) alleges:

"That on, to wit, said 2nd day of June, 1920, and for some time previous thereto, plaintiff was and had been employed by defendant corporation as a laborer in what was designated and known as the 'Bull Gang;' that plaintiff, as directed by defendant corporation and as such employee in said 'Bull Gang,' did work in and around said smelter and ore reduction works and in and around the mills, shops, works, yards, plants, factories and other buildings and appurtenances thereto belonging; that plaintiff's work as an employee of defendant corporation as aforesaid did consist of pick and shovel work, clearing up the yards, loading and unloading brick and lime, laying track for ore and slag cars, drilling holes in slag dumps, assisting in repairing said smelter and ore reduction works, together with the said appurtenances and in installing machinery, fixtures and equipments in said smelter and ore reduction works and appurtenances thereto."

Plaintiff, John T. Littlejohn testified that he had been employed in defendant's "Bull Gang" since

August, 1919, until June 2, 1920, the date he received the injuries complained of; that he did all kinds of work around the smelters, works and yards, "cleaning up, moving machinery, unloading cars, drilling concrete, swinging a jack-hammer, installing machinery," etc. That the smelter plant consisted of the smelter, sample mill, machine shops and other works; that the concrete pit and structure upon which he was working at the time of the accident was an addition to the sample mill; that the sample mill was used to crush ore for the smelter and the crushers therein operated by motor power. (Tr. p. 36.) That the concrete pit into which he fell was about ten feet wide and ten feet deep where the boards crossed it; that it was built as a conveyor to run ore from the rolls into the sample mill. (Tr. p. 37.)

On June 2, 1920, plaintiff and other employees were directed by defendant's foreman to install certain bolts in the said concrete structure, and thereupon, as directed, plaintiff did take one of the bolts and walked out on the staging with it in his arms for the purpose of placing it as directed; that he was obliged to walk on the planks placed over the concrete pit in order to install the bolt as directed; that the plank upon which plaintiff was standing broke, thereby precipitating him to the bottom of said pit, a distance of about ten feet; that by reason of said fall plaintiff sustained very serious and permanent personal injuries; (Tr. pp. 36-

37-38-39); that he was treated for fourteen days in defendant's hospital and then went back to work for the defendant and was kept at light work for seventeen days when he was "laid off" by defendant (Tr. pp. 38-39); that after said injury he only worked seventeen days as aforesaid; that he could only perform light work, and there was no such work available; that he could not do clerical work (Tr. pp. 42-43); that since the injury he slept good some nights and not at all other nights; that he never had insomnia before; that at the time of the trial he was still nervous, his hands and legs trembled, and he lost fourteen pounds in weight; that eight stitches were put in his head; that a company doctor told plaintiff that his skull was fractured; that flat three-cornered bones came out of plaintiff's skull as a result of his injuries (Tr. p. 44); that previous to the injury he had been in good health all his life; that he was earning \$4.60 per day at the time of his injury; that he earned no money since except for said period of seventeen days. (Tr. p. 43).

In September, 1920, Dr. J. B. McNally, a physician and surgeon of Prescott, Arizona, made a thorough examination of plaintiff's physical condition, and testified to the result of said examination. We call this Honorable Court's special attention to the testimony of Dr. J. B. McNally on direct and cross-examination (Tr. pp. 44-47).

During the trial defendant's physicians were per-

mitted to make a thorough physical examination of plaintiff's head (Tr. pp. 57-60), and to test his pulse (Tr. p. 72), which ranged from 128 to 134. Defendant's physician testified that in a man of plaintiff's age his normal pulsations should be from 80 to 90, sitting. (Tr. p. 72).

The cause of the accident and injuries to plaintiff was substantiated by eye witnesses (Tr. 47-48-49), and was not controverted in any way by defendant.

Plaintiff's physical condition before and after the injuries received was shown by Harry Garrison (Tr. pp. 51-52) and by plaintiff's wife, Sarah Littlejohn, (Tr. pp. 52-53-54).

From the evidence introduced, it appears beyond any doubt that plaintiff was seriously and permanently injured. The American Mortality tables introduced in evidence gave his life expectancy at sixteen and one-half years (Tr. p. 57). His earning capacity at the time of the injury was \$4.60 per day (Tr. p. 43) which would amount to over \$1600.00 per annum or a total in excess of \$25,000.00 during his life expectancy. The jury awarded him damages in the sum of \$8000.00, which included his loss of time from June 2, to November 26, 1920, the date of the trial.

PLAINTIFF'S REPLY ARGUMENT.

(A) Defendant's Assignments of Error numbered

I. and II., Relating to Special Damages: (Tr. p. 100).

Proposition I.

The reasonable value of working time lost by an employee and diminished earning power, directly resulting from the injury, are all matters of actual loss and as such are recoverable.

Arizona Copper Co. v. Burciaga, 20 Ariz. 85-94; 177 Pac. 29.

See **Inspiration Con. Cop. Co. v. Lindley**, 20 Ariz. 95-101; 177 Pac. 24; 8 R. C. L. 477.

Arizona Eastern R. Co. v. Bryan, 18 Ariz. 106-118; 157 Pac. 376; 17 C. J., Sec. 106 p. 780.

“The pecuniary value of time lost by plaintiff in consequence of the injury is a proper element of recovery, where the existence and amount of the loss is established with the requisite certainty. It has been held, however, that wages lost are not recoverable as such, but that in cases where it is permitted to prove the amount of wages lost, such evidence, is admissible as a measure of the value of plaintiff's time of which he has been deprived. * * * *”

17 C. J., Sec. 106, p. 780-81.

All damages for loss of time up to the date of trial may be recovered. 17 C. J., Sec. 106, p. 781.

“The element of loss of time is held properly to include only such loss as has accrued up to the time of trial, a subsequent loss of time is to be included in a recovery for de-

creased earning capacity. Hence a recovery both for loss of time and for impairment of earning capacity is not a double recovery. * * * *” 17 C. J., Sec. 106, p. 781.

PLEADING SPECIAL DAMAGES

The rule is stated in 17 C. J., Sec. 312, p. 1014, under the title “Damages,” as follows:

“In some jurisdictions it is necessary, in order to admit proof of loss of time, or loss of earnings for a time, that the loss be specially pleaded. In others it would seem that proof of this nature is admissible without a special allegation. But even in those jurisdictions in which particularity of averment is ordinarily required, it has been held that where the injury alleged would necessarily import a loss of time, a more direct averment may be dispensed with. Regardless of this conflict of authority, plaintiff is not entitled to recover for loss of time where, instead of asking damages generally for the injuries sustained, he specifies the elements of damages for which he seeks recovery and omits to mention the element of loss of time. * * * *” 17 C. J., Sec. 312, p. 1014.

“The general rule is that to permit a recovery of special damages they must be particularly averred in the complaint. This is true whether they result from tort or breach of contract, and the rule applies in equity as well as at law. * * * *” 17 C. J., Sec. 306, p. 1002.

MOTIONS TO STRIKE

Motions to strike are not favored and will be granted only in a clear case. 16 Cyc. 616.

It is discretionary with the Court whether to grant or refuse a motion to strike out allegations of a pleading. 16 Cyc. 643.

Defendant's objection to plaintiff's allegations of special damage for loss of time is palpable hypercriticism.

(B) Defendant's Assignments of Error numbered III. and IV., Relating to the Overruling of Demurrers to Plaintiff's Complaint. (Tr. p. 10-11. Discussed in Brief of Plaintiff in Error, pp. 18-25).

Defendant contends that the allegations in paragraph III of the Complaint show that plaintiff was not engaged in a "hazardous occupation in mining, smelting," or "in any other industry."

Pertinent Arizona Statutes Relating to Hazardous Occupations.

Par. 3147, Civil Code, Arizona, 1913, provides:

"Employment in all underground mines, underground workings, open cut workings, open pit workings, in or about, and in connection with, the operation of smelters, reduction works, stamp mills, concentrating mills, chlorination processes, cyanide processes, cement works, rolling mills, rod mills and at coke ovens and blast furnaces, is hereby declared to be injurious to health and dangerous to life and limb."

Par. 3155, Civil Code, Arizona, 1913, provides:

"The labor and services of workmen at manual and mechanical labor, in the employ-

ment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

“By reason of the nature and conditions of and the means used and provided for doing the work in said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and are unavoidable by the workmen therein.”

Par. 3156, Civil Code, Arizona, 1913, provides:

“The occupations hereby declared and determined to be hazardous within the meaning of this chapter are as follows:

* * * * *

“(8) All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters.”

* * * * *

“(10) All work in mills, shops, works, yards, plants and factories where steam, electricity, or any other mechanical power is used to operate machinery and appliances in and about such premises.”

Par. 3158, Civil Code, Arizona, 1913, provides:

“When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions

of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be lable in damages to the employee injured. * * * * ”

The Complaint herein was drafted to come within the purview of the foregoing provisions of the Arizona Liability Law, “For Injuries to Workmen in Dangerous Occupations.” It specifically alleges that “steam, electricity, and other mechanical power was (were) then and there used to operate the machinery and appliances in and about said smelter and ore reduction works and appurtenances aforesaid.” (Par. II.).

Plaintiff’s status at the time of the accident is covered by the provisons of subdivisions (8) and (9) Par. 3156, *supra*, and upon said provisions the complaint was drafted.

NOTE: With all due respect to counsel for defendant, we consider ourselves greatly burdened in attempting to present a logical Brief in this case, and at the same time follow counsel’s argument. It seems to us that opposing counsel should have presented their Assignments of Error, and argument thereon in a more logical and orderly manner.

Therefore, in order to dispose of the “Hazardous Occupation,” proposition raised by demurrer and by motion for a directed verdict, we will now

discuss Defendant's Assignment of Error No. XI. (Tr. p. 103), and will notice the authorities cited in support of said Assignments of Error Nos. III. and IV. aforesaid.

(C) Defendant's Assignment of Error No. XI. (Tr. p. 103) relating to "Hazardous Occupations."

Defendant, in its Brief, claims that plaintiff was not engaged in a hazardous occupation as contemplated by the Statutes of Arizona, at the time he received the injuries. Defendant also asserts that the evidence fails to show that the accident occurred by reason of an "inherent risk and hazard, unavoidable and due to a condition of the employment in a hazardous occupation." (Brief of Plaintiff in Error, pp. 45-50.)

Proposition II.

A workman employed to perform manual labor of any kind in or about open pits, ore reduction works or smelters; or in mills, shops, yards, plants or factories where steam, electricity or any other mechanical power is used to operate machinery or appliances in or about such premises, is engaged in a Hazardous Occupation as contemplated by the Arizona Liability Act.

Pars. 3155 and subdivisions (8) and (10) Par. 3156, Civil Code, Arizona, 1913.

Boody, Admr. v. K. & C. Mfg. Co., 77 N. H. 208; 90 Atl. 860; L. R. A., 1916 A., 10; Ann. Cas. 1914 D., 1280. Petition for re-hearing denied.

In re **Larsen**,

In re **Paine Drug Co., et. al.**, 218 N. Y. 252, 256;
155 N. Y. Supp. 759; 112 N. E. 725.

O'Toole v. Brandram-Henderson, 48 Nova Scotia,
293; 21 Dom. L. R. 83.

Pellerin v. International Cotton Mills, 248 Fed.
242.

Matter of White v. N. Y. C. & H. R. R. Co.,
216 N. Y., 653; 110 N. E. 1051, Affirmed in
United States Supreme Court March 6, 1917.

N. Y. C. R. Co. v. White, 243 United States 188;
37 Sup. Ct. 247; 61 L. Ed. 667.

Calumet & Arizona Mining Co. v. Chambers, 20
Ariz. 54; 176 Pac. 839.

Inspiration Con. Cop. Co. v. Mendez, 19 Ariz. 151;
166 Pac. 278.

Suburban Ice Co. v. Industrial Board, 274 Ill.
630; 113 N. E. 979.

Gibson v. Industrial Board, 276 Ill. 73; 114 N. E.
515.

Armour & Co. v. Industrial Board, 273 Ill. 590;
113 N. E. 138.

Parker-Washington Co. v. Industrial Board, 274
Ill. 498; 113 N. E. 976.

Chicago Dry Kiln Co. v. Industrial Board, 276
Ill. 556; 114 N. E. 1009.

Chicago Cleaning Co. v. Industrial Board, 283 Ill.
177; 118 N. E. 989.

Fogarty v. National Biscuit Co., 221 N. Y. 20;
116 N. E. 346.

Dose v. Moehle Lithographic Co., 221 N. Y. 401;
117 N. E. 616.

A few extracts are made from the opinions of the Courts in some of the cases above cited, which will suffice to show the rule of law applicable to said proposition II.

BOODY, ADMRX., v. K. & C. Mfg. Co. supra,
(L. R. A. 1916 A., 10 (N. H.).

Deceased was employed to work around a manufacturing mill. Among other things, his duties required him to clean the racks constructed to catch rubbish coming down the mill race to defendant's mill. On the morning of the accident, he was seen standing on a walk with his back to the stream attempting to pull rubbish out of a rack. Later, his body was recovered from the river below the mill and a broken rake was found in the flume, and a freshly broken rake handle was found in the river.

One of the employments described in Section 1 of the New Hampshire Workmen's Compensation Act was:

"work in any shop, mill, factory or other place on, in connection with, or in proximity to any hoisting apparatus, or any machinery propelled or operated by steam or other mechanical power, in which shop, mill, factory, or other place five or more persons are engaged in manual or mechanical labor."

The defendant contended that at the time deceased met his death, he was not employed in a hazardous occupation as contemplated by the Statute. On this point, the Supreme Court of New Hampshire said: (L. R. A. 1916 A., 12).

“It will be helpful, when considering the question, to remember that it is the office of Sec. 1 to limit the workmen who come within the operation of the act, and of Sec. 2 to describe an accident that will entitle such workmen to its benefits. In the final analysis, the defendant’s contention is that the words “workmen engaged in . . . work in any shop, mill, factory, or other place, on, in connection with, or in proximity to,” power-driven machinery, are descriptive of an accident, not an employment, which will bring a workman within the operation of the act, or that those words were intended to limit the accidents that will entitle those engaged in such work to the benefits of the act. The act, however, says that it applies “to workmen engaged in manual or mechanical labor in the employments described in this section,” not to those who are injured while engaged in any one of those employments by the particular risk which induced the legislature to include those engaged in it within the operation of the act.”

The Supreme Court of New Hampshire held that the defendant was liable for damages. A petition for rehearing was denied. The Boody case, *supra*, seems to be a leading case on the proposition involved and it has been frequently cited and approved by other courts.

IN RE LARSEN, 112 N. E. 725 (N. Y.), the deceased was employed in the capacity of porter, elevator, and handy man, and his work consisted of the ordinary work of a porter and elevator man. He was employed by a drug company engaged in manufacturing and selling drugs, chemicals, medicines and pharmaceutical preparations at both retail and wholesale, which was a hazardous occupation, as provided by the New York laws. Deceased, at the time of his death, was engaged in building a shelf in his employer's place of business, lost his balance and fell down the elevator shaft by reason of which he was instantly killed. The Court of Appeals of New York City, by a unanimous opinion, decided that the Drug company was liable in damages for the death of the deceased. The Court, speaking through Hiscock, J., says: (112 N. E., 726-7).

“Appellants’ second proposition means that a person engaged generally in an employment which has been defined as hazardous cannot recover compensation for injuries received while performing some act not immediately connected with what might be deemed the hazardous and characteristic feature of the business, although such act was incident to the employment and necessary in prosecuting and carrying forward the business. To illustrate, in the present case it means that no award can be made because the employee was injured while building a shelf for use in the business, rather than engaged in the immediate process of manu-

facturing drugs and chemicals, although such shelf was entirely necessary in the prosecution of the business. We think this is too narrow a view of the statute, and would lead to limitations upon its application which were not intended or anticipated by the Legislature. It is not necessary to attempt to lay down a final and universal rule on that subject. We feel perfectly secure, however, in holding that where, as in this case, an employee is injured while performing an act which is fairly incidental to the prosecution of a business and appropriate in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which employment is claimed.

The order should be affirmed, with costs."

O'TOOLE V. BRANDRAM-HENDERSON, *supra*, (21 Dom. L. R. 83.) Under the Nova Scotia Workmen's Compensation Act, compensation is allowed in respect to an injury to a teamster while driving a truck and a team of horses in the delivery of the output of the factory, although at some distance therefrom, the horses and truck being a part of the factory "plant" under the extended meaning given by No. 2 subs 2 to the word "factory," so that an injury "on, in or about" any part of the plant is within the statute.

PELLERIN V. INTERNATIONAL COTTON MILLS, *supra*, (248 Fed. 242).

Plaintiff had been employed in defendant's cotton mill for several years. He had also done the ordinary repair work which a carpenter would do either in a carpenter shop located in one of the mill buildings or wherever he was sent to do repair work about the mill. He did not, however, receive the injury for which he sued while working on or in connection with machines of any kind, nor was it received in any building containing machinery. He was injured by falling from a platform adjoining and appurtenant to, and outside of, one of the mill buildings, under directions to get a certain fellow employee to help him and to carry with such help a wooden cupboard then on said platform into a room in the building and there put it up. He and the fellow employee were trying to lift the cupboard and turn it on the platform so as to get it through the door and into the room where it was to be put up. Plaintiff's claim was that the fellow employee negligently allowed the cupboard to strike the wall of the building and that he was thereby caused to lose his footing on the platform and fall to the ground about three feet, seven inches below the level of the platform, whereby he was injured.

The New Hampshire statutes applicable to the case are quoted in the opinion as follows: Section 1:

“workmen engaged in manual or mechanical labor in the employments described in this section, which, from the nature, condi-

tions or means of prosecution of said work, are dangerous to the life and limb of workmen engaged therein, because in them the risks of employment and the danger of injury caused by fellow servants are great and difficult to avoid."

"(b) Work in any shop, mill, factory or other place on, in connection with or in proximity to any hoisting apparatus, or any machinery propelled or operated by steam or other mechanical power in which shop, mill, factory or other place five or more persons are engaged in manual or mechanical labor."

This Honorable Court will observe that the Arizona statutes are much broader and more comprehensive than the New Hampshire Statute, in that they include "all work in or about * * * ore reduction works and smelter."

"All work in mills, shops, works, yards, plants and factories * * * * " (Subdivisions 8 and 10, paragraph 3156, Civil Code Arizona, 1913.)

The Circuit Court of Appeals, First Circuit, in said Pellerin case held:

"It is the work included in the scope of the plaintiff's employment which here controls, and not the character of the particular work being done by him under said employment at the particular time of his injury."

Also held that the word "mill," as used in the statute "includes not only the buildings wherein the "work" is done, but everything appurtenant

to them, as a dam, flume, yard or ways provided for use by employees." citing *Boody v. K. & C. Mfg. Co. supra.*

In the case at bar, it will be observed that on June 2, 1920, the day of the accident involved, plaintiff and five other employees were taken over by defendant to its sample mill where said employees "jacked up the rolls" (machinery), the rolls being the iron machinery used to crush defendant's ore, and are operated by motor power. (Tr. p. 36.)

SUBURBAN ICE CO. V. INDUSTRIAL BOARD, *supra*, (113 N. E. 979, Ill.), HELD, That where a teamster employed by an ice and fuel company, whose duty it was to deliver ice and fuel and work in and around the place and care for the horses of the company, was kicked by one of the horses and died from the effects thereof, his widow and administratrix could recover under the provisions of the Workmen's Compensation Act. We quote the following lucid excerpt from the opinion in said case: (113 N. E., 981-2.)

"Considered in the most favorable light for plaintiff in error's argument on this point, the work in which the deceased was engaged was a part of the occupation or enterprise of the plaintiff in error. The entire act and its purpose must be considered in order to reach a reasonable conclusion as to the meaning and construction of any of its provisions.

“The men in the building of plaintiff in error where the machinery was located and the ice manufactured were certainly within the act. The workmen around the building and caring for the property were within the act. Those whose duties took them to the plant to take away the product were within the act, and we can reach no other conclusion than that the duties of the deceased were of such a nature, so related to and connected with the occupation of plaintiff in error, as to require that plaintiff in error, under the provisions of the Workmen’s Compensation Act, shall be held liable for the injury.”

GIBSON V. INDUSTRIAL BOARD, *supra*, (114 N. E. 515, Ill.). The statute involved was Clause 6 of paragraph (b) of Section 3 of the Illinois Workmen’s Compensation Act, which declared a hazardous occupation “any enterprise in which explosive materials are manufactured, handled or used in dangerous quantities.

In that case a teamster in the employ of a company engaged in selling and delivering gasoline was fatally injured from a fall while returning home after delivering gasoline, when he attempted to raise the canopy top attached to the seat and from being run over by the wagon. HELD, that the fact that the accident did not result from the explosive product which he carried did not prevent him from being under the Workmen’s Compensation Act, or preclude his widow from recovering compensation.

ARMOUR & CO. V. INDUSTRIAL BOARD, *supra*, (113 N. E. 138, Ill). HELD, that widow of a

teamster and employee of the Armour Packing Company who died as a result of injuries received from falling from his wagon while delivering goods to his employer was entitled to compensation for the death of her husband.

PARKER-WASHINGTON CO. V. INDUSTRIAL BOARD, *supra*, (113 N. E. 976, Ill.). HELD, that a teamster employed by a teaming company, which had contracted to deliver a quantity of crushed stone to a contracting company engaged in street paving, while standing up and reaching over to whip the horses he was driving, lost his balance and fell under the wheels of the wagon and **was** killed, that the employer was liable under the Workmen's Compensation Act.

CHICAGO DRY KILN CO. V. INDUSTRIAL BOARD, *supra*, (114 N. E. 1009, Ill.). HELD, that a watchman employed in a planing mill was entitled to compensation for injuries received while protecting the property at the plant from suspected persons.

CHICAGO CLEANING CO. V. INDUSTRIAL BOARD, *supra*, (118 N. E. Ill.). HELD, that the cleaning and washing of windows is a hazardous occupation and is under the Workmen's Compensation Act, included in the business of "maintaining any structure." We quote the following excerpt from the opinion in said case:

"The business of washing windows, as

such, in large cities, is as much a part of the maintenance of buildings as would be the replacing of glass in windows, the painting and decorating of the buildings, or the re-pointing of the outside where the mortar between the bricks was giving way. No one can seriously question but that those engaged in any of such businesses and employments would come under the act."

FOGARTY V. NATIONAL BISCUIT CO., *supra*, 116 N. E. 346, N. Y.). The National Biscuit Company was engaged in the bakery business, designated as "hazardous" under the Workmen's Compensation Law. Plaintiff was employed by the Biscuit Company as a night watchman. His duties were to patrol the buildings. He was injured in the line of his duty. HELD, that he was entitled to compensation.

DOSE V. MOEHLE LITHOGRAPHIC CO., *supra*, (117 N. E. 616, N. Y. Moehle Lithographic Company was engaged in the business of lithographing and printing, classified as "hazardous" in group 40, section 2 of the Workmen's Compensation Law of the State of New York. Business of the company was carried on in a plant maintained by it for that purpose. The plaintiff was employed by the company as a bricklayer to point up one of the walls of its plant and repair cracks therein. One of the ropes supporting a scaffold upon which he was working broke and precipitated him to the ground, a distance of some thirty feet, whereby he was injured.

He was awarded damages by the Industrial Board. The company and its insurer appealed from the determination of the Industrial Commission. On appeal the determination of the Industrial Commission was reversed and the claim dismissed. The plaintiff then appealed to the Court of Appeals of New York, with the result that the order of the Appellate Division of the New York Court was reversed and the determination of the State Industrial Commission was affirmed. We quote the following excerpt from the opinion in said case: (117 N. E. 617.)

“The injury received by Dose was accidental, and sustained by him as an employee in the service of the company which carried on a hazardous employment. The fact that he was employed in bricklaying, which was not carried on for pecuniary gain by the company, is untenable. A proper conduct of the business of the company required a suitable plant, machinery, tools, etc. The company could not, in justice to itself, its business or its employees, continue business in a plant which was actually unsafe, or in danger of becoming so. Dose was engaged in an employment incidental and requisite to the business carried on by the company, and under the law as amended was clearly entitled to compensation.”

N. Y. CENTRAL R. CO. V. WHITE, *supra*, (243 U. S. 188. A night watchman in the employ of a railway company was injured while in the performance of his duty to guard tools and materials intended to

be used in the construction of a new railway station. The Workmen's Compensation Commission of New York awarded him compensation. The Court of Appeals of that state affirmed the award. The railroad company, on writ of error, took the case to the U. S. Supreme Court where the judgment of the lower court was affirmed.

ARIZONA CASES

IN INSPIRATION CON. COP. CO. V. MENDEZ, *supra*, (19 Ariz. 151-161) the Supreme Court of Arizona said:

“The conditions occurring which create liability to respond in damages are: That the person injured must be in the service of the proprietor carrying on the hazardous industry; that the industry to be dangerous and hazardous must be one which fairly comes within one or more of the industries enumerated in paragraph 3156; that at the time the injury was suffered, the employee injured must be engaged in the performance of some duty of his employment; * * * ”

From the foregoing excerpt, it will be seen that the test is: “That the person injured must be in the service of the **“proprietor carrying on the hazardous industry;”** and in addition, **“that at the time the injury was suffered, the employee injured must be engaged in the performance of some duty of his employment.”**”

Tested by this rule, can there be any question

that plaintiff is entitled to recover under the Arizona Liability Law?

CALUMET & ARIZONA MIN. CO. V. CHAMBERS (20 Ariz. 55), *supra*. In this case, the complaint alleged, *inter alia*, that at the time of the accident the plaintiff was in the service of the defendant engaged in performing his duties about the said smelter, including the duty “* * * in the event of an emergency or accident to assist and aid in restoring conditions and putting things in working order.” (p. 58). The cause of the accident was alleged in the complaint (p. 59) as follows:

“That on the fifteenth day of January, 1915, while plaintiff was engaged in assisting other coemployees to adjust a car to the track from which it had been thrown in some unexplained manner, not important, “. . . and which plaintiff was assisting and aiding in putting the said car back on the tracks,” the car was made to appear to plaintiff as in the act of turning over on him, and plaintiff in order to escape from injury by the overturning car jumped, and as he jumped he caught his foot on an iron bar and fell into an open slag spout, and by reason thereof plaintiff received serious injury to his right leg. * * * ”

The Court then observed:

“This language, stripped of its many qualifying adjectives, sets forth the fact that the plaintiff, while assisting other employees to replace a fettle car on a track, believed the car was overturning and falling on him, and,

in order to escape from the falling car, plaintiff jumped and fell striking an open slag spout, thereby seriously injuring his leg. * *”

“Consequently, the accident was occasioned by an accident arising out of and in the course of plaintiff’s labor, service, or employment and due to a condition or conditions of such occupation or employment. * *” (p. 60.)

The judgment of the lower court was affirmed.

Proposition III.

Where an employee is injured while performing an act which is fairly incidental to the prosecution of a business and appropriate in carrying it forward and providing for its needs, he or his dependents are not to be barred from recovery because such act is not a step wholly embraced in the precise and characteristic process or operation which has been made the basis of the group in which employment is claimed.”

The above proposition is taken from the opinion of Hiscock, J., in an action arising under the New York Workmen’s Compensation Law, and is fortified by the concurrence of all the Judges of the Court of Appeals of New York, in **Matter of Larsen v. Paine Drug Co.**, 218 N. Y. 252, 256; 112 N. E. 725, 727. (Decision May 12, 1916.)

The above proposition has been adopted, cited and approved in subsequent cases. See the following:

Fogerty v. National Biscuit Co., *supra*, 116 N. E. 346 N. Y.

Dose v. Moehle Lithographic Co., *supra*, 116 N. E. 616 N. Y.

Waters v. Taylor, 218 N. Y. 248; 112 N. E. 727; L. R. A. 1917 A., 347.

Deyo v. Arizona Grading & Construction Co., 18 Ariz. 149; 157 Pac. 371.

Vogt v. Southern Coal, Coke & Mining Co., 210 Ill. App. 620.

White v. East St. Louis R. Co., 211 Ill. App. 14

Defendant, in the case at bar, was engaged in a hazardous occupation, to wit, operating ore reduction works and smelter, consisting of mills, shops, works, yards, plants and factories. Plaintiff had been employed to do all sorts of work in and around the smelter plant, such as "cleaning up, moving machinery, unloading cars, drilling concrete, swinging a jack-hammer, installing machinery," etc. (Tr. 36). Obviously, this work was necessary in carrying on the business of the defendant.

The law on this particular point is well stated in **GIBSON V. INDUSTRIAL BOARD**, *supra* (114 N. E. 515 N. Y.) as follows:

"Plaintiffs in error were engaged in a business that was extra hazardous under the act, and the deceased was working for them as a driver of one of their wagons. Such work was necessary in carrying on the principal business of the plaintiffs in error. We think

the occupation of the deceased sufficiently connected with the extrahazardous business of the plaintiffs in error, and, such business being under the act, his widow was entitled to recover under its provisions.

“The judgment of the circuit court will be affirmed. Judgment reaffirmed.”

IN DEYO V. ARIZONA GRADING & CONSTRUCTION CO., supra, (18 Ariz. 149-155), an action for damages under the Employer's Liability Law, Chief Justice Ross used this language: (p. 155).

“The grade or station of the employee or the kind of work being performed by him, was of any consideration the important thing being that the employee was ‘in the service of such employer’ in some hazardous occupation at the time of the injury or death.”

The provisions of Employers' Liability and Compensation Acts are construed liberally by the courts, so as to protect workmen employed in hazardous occupations.

IN ARIZONA HERCULES COPPER CO. V. CRENSHAW, ADMR., 21 Ariz. 15-20; 184 Pac. 996, the Supreme Court of Arizona, speaking through Baker, J., uses this language:

“The new concept is that the master must answer, regardless of his (master's) fault. This new and different scheme and basis of indemnity for industrial accidents should be remedially applied by the courts, with a view

neither by the institution
nor Section 3154

of bringing within the beneficial operation of the law all workers whose accidental injuries are the result of inherent occupational risks and hazards, rather than with the view of excluding from the operation and protection of the law workers who justly and fairly fall within its provisions. *Arizona Copper Co. v. Hammer*, 250 U. S. 400, 63 L. Ed. 1958, 39 Sup. Ct. Rep. 553; *In re Rheinwald*, 168 App. Div. 425, 153 N. Y. Supp. 598."

IN *VOGT. V. SOUTHERN COAL, COKE & MINING CO.*, *supra*, (210 Ill. App. 620), plaintiff was employed as "top man" or machinist's helper at the Company's mine. He was sent to the engine house by the top boss and directed with others to split a circular disc. In performing this task he was injured. The statute of Illinois under which the action was brought named the following enterprises as being hazardous; "* * * mining, surface mining or quarrying."

We quote the following excerpts from the opinion in said case, (p. 626):

"In determining whether or not a person has received an injury arising out of and in the course of his employment, the Supreme Court has not adopted a strict construction of the Compensation Act but has held that if the occupation in which the injured person was engaged could reasonably be referable to the principal work engaged in by the employer that construction should be adopted, and if the employer was engaged in an extra-hazardous employment, as contemplated by the statute as above set forth, the injured

person should be held to be within the provisions of the statute and the defenses of assumed risk, contributory negligence and fellow-servant would not be available to the employer. *Armour & Co. v. Industrial Board of Illinois*, 273 Ill. 590; *Parker-Washington Co. v. Industrial Board of Illinois*, 274 Ill. 498; *Gibson v. Industrial Board of Illinois*, 276 Ill. 73."

(p. 628) " * * * we are of the opinion that appellee was at the time of receiving his injury engaged in the extrahazardous employment of mining as contemplated by the statute. The hoisting engine being repaired was an engine used for lifting the coal at appellant's mine, and the evidence tended to show that the mining operations at that point were tied up by reason of the break in this disc and that appellee at the very time of receiving his injury was employed in the business of repairing said engine in order that said mining operations could be resumed. His injuries occurred in the course of and grew out of his employment in and about the mining business conducted by appellant, and the defenses of contributory negligence, assumed risk and fellow-servant were therefore not available to appellant."

DEFENDANT'S AUTHORITIES

(Brief pp. 21-25)

ARIZONA EASTERN R. R. CO. V. MATTHEWS, 20 Ariz. 282; 180 Pac. 159. Matthews was a local bill clerk for a railroad company and was not engaged in "manual or mechanical labor." In returning from a restaurant to the freight depot, he fell into a pit and was injured. The Court said:

“So we conclude appellee (Matthews) was not, at the time of the accident engaged in manual or mechanical labor, and therefore is not entitled to the benefits of the Employer’s Liability Act.”

CONROY V. CITY OF CLINTON, 33 N. E. 525 (Mass.), was a negligence case and is not even remotely in point.

In EDELWEISS V. COM. 125 N. E. 260 (Ill.), two employees in a restaurant got into a sudden altercation whereby one was struck on the skull and killed. There was no proof to show that the altercation between them grew out of the manner of performing their work or had any connection with it.

The Court observed: “It is not sufficient that an accidental injury occur in the course of the employment, but it must arise out of the employment.” The case in no way sustains defendant’s contentions.

WENDT V. INDUSTRIAL COM., 141 Pac. 31 (Wash.). In this case, Clara Wendt, respondent, appealed from a decision of the Commission holding that she was not entitled to compensation upon the accidental death of her husband, the Commission holding that the deceased was not engaged in a hazardous employment, within the meaning of the law, at the time of receiving the injury causing his death. The lower court overruled the finding of the Commission, and directed that the claim be

allowed, from which decree the Commission appealed to the Supreme Court of the State of Washington, where the judgment of the lower court allowing the claim, was affirmed by an unanimous opinion. We quote the following illuminating excerpt from the opinion in said case:

“If the employer conducts any department of his business, whether large or small, as an extrahazardous business within the meaning and defined terms of the act, his workmen would come within the class designated by the act, and be entitled to the protection of the act. Such interpretation we believe falls within the letter as well as the spirit of an act that, because of its humaneness and declaration of a new public policy should be interpreted liberally and broadly in harmony with its purpose to protect injured workmen and their dependents independent of any question of fault.”

Why counsel have cited the Wendt case as sustaining any of their contentions is a mystery to us.

GUERRIERI V. INDUSTRIAL COM., 146 Pac. 608 (Wash.). The plaintiff was injured while operating a passenger and freight elevator in a mercantile establishment. The Court held that such work was not a hazardous employment for the reason that under the Washington statutes, the classification applied to the operation of “Grain Elevators” and not to passenger or freight elevators.

STATE V. BUSINESS PROPERTY CO., 152 Pac. 334 (Wash.). This case defeats defendant's

contention in toto, and reverses the judgment of the lower court which held that the respondent was not liable. In holding the respondent liable the Supreme Court of Washington said:

“The respondent’s liability is not to be determined by an answer to the question whether it is **principally** engaged in an extra-hazardous business, or in conducting extra-hazardous works, but if it ‘conducts any department of (its) business, whether large or small, as an extrahazardous business within the meaning and defined terms of this act, (its) workmen would come within the class designated by the act. * * *’ Wendt v. Industrial Commission, *supra*.”

REMSNIDER V. UNION SAVINGS & TRUST CO., 154 Pac. 135 (Wash.). This was a negligence action instituted by plaintiff for personal injuries received while employed by defendant as its janitor. The jury returned a verdict in favor of plaintiff for \$5,000.00 upon which judgment was entered. From the judgment the defendant company appealed claiming that plaintiff was a “workman” engaged in “extrahazardous” work within the meaning of the Workmen’s Compensation Act of Washington, and that therefore the Court had no jurisdiction of the action. The Supreme Court decided against this contention and said:

“But neither the work of a janitor in an office building nor working in or about an elevator shaft has yet been classified by the department as extrahazardous, nor has any

rate of contribution been fixed as provided in the clause quoted.

“In the recent case of *Guerrieri v. Industrial Insurance Commission*, 84 Wash. 266, 146 Pac. 608, after another careful analysis of the statute, we held that one who was employed in operating a passenger or freight elevator or lift in a mercantile establishment was not engaged in an extrahazardous employment within the meaning of the statute. That decision by plain inference is contrary to the appellant’s contention here. Respondent was not engaged in an extrahazardous work within the meaning of the act.”

WILSON V. DORFLINGER & SONS, 218 N. Y. 85 (112 N. E. 567), cited by defendant, is not in point. The firm for whom deceased was employed was “engaged in the business of selling glassware,” a non-hazardous enterprise. While operating an elevator on the firm’s premises, the deceased fell down the elevator shaft and was killed. The Workmen’s Compensation Law only applied to the “operation of **grain** elevators,” and hence did not embrace ordinary **passenger** elevators. The firm’s business of “selling glassware” was not a business or occupation mentioned in any of the groups enumerated in the Workmen’s Compensation Law. It follows that the accident did not and could not come under the Workmen’s Compensation Law.

NEW CORNELIA COP. CO. V. ESPINOSA, 268 Fed. 742, (Circuit Court of Appeals, Ninth Circuit) (Brief pp. 19-20). Deceased, in going to his

work in the mines of the company, near Ajo, Pima county, Arizona, built a fire on the surface about 30 or 40 feet from the entrance to the mine for the purpose of warming himself. The fire was started about 15 minutes before the time deceased was required to descend to his work in the mine. An explosion of powder in the wood killed him. His administrator brought suit under the "Employer's Liability Law of Arizona," and recovered judgment. The judgment was reversed for the following reasons, tersely stated by Mr. Justice Morrow as follows:

"* * * but the deceased was not at work in the mine at the time of the explosion causing his death, and he was not in dangerous proximity to the explosive being used in the mine. He was on the surface, where no mining operations were being carried on by the defendant, and where it was not using explosives. The deceased was employed by the defendant to work in the mine, and not on the surface. The hazardous occupation in which the deceased was engaged was in the mine, and not on the surface. The building of a fire on the surface was no part of defendant's mining operations. It was the deceased's voluntary act, at a point 10 or 15 feet to the side of the road, and before he had gone to work, and against the general instructions of the mine foreman.. The powder or dynamite was not placed under the wood by the defendant, or by its direction or consent. It was concealed under the wood, and the inference is that, if it was obtained from the defendant, it was taken without authority and was a tortious act.

“The risk or hazard which the deceased incurred in being near the fire on the surface was not a risk or hazard inherent in the work in the mine, and in the doing of that work the risk or hazard was avoidable by the deceased. It was an outside venture, unattached to the hazardous employment in which he was engaged when at work in the mine. He need not have gone there; he need not have started the fire. The work for which deceased was employed did not necessitate his presence near the fire on the surface, or near the explosive that was there, or at that place at all. It did not necessitate his dangerous proximity to gunpowder or dynamite at or near the place of the accident.”

On re-hearing, in the Espinosa case, the rule laid down in the Matthews case, *supra* (20 Ariz. 282; 180 Pac. 159) was discussed.

DEFENDANT'S ASSIGNMENT OF ERROR NO. V.

(D) Defendant's Assignment of Error No. V., relating to the testimony concerning Liability Insurance. (Tr. p. 101, Brief pp. 25-36).

This testimony was not elicited by any question propounded by plaintiff's attorneys. The trial court permitted plaintiff to relate some details concerning his injuries and plaintiff made the statement that Mr. Thompson informed him that the Company had the men insured, the language used being: “They have them all insured and just as soon as ever those pictures are developed, I will go down

and try to settle up with you. I don't want you to think'' (objection) (Tr. p. 40). The statement was casually made in a lengthy recital of details, in which the subject of insurance was brought up by Mr. Thompson.

The trial court subsequently struck out all the testimony of the witness regarding liability insurance and instructed the jury then and there as follows: “* * therefore you will not consider it at all for any purpose. Make up your verdict wholly independent of that statement.” (Tr. p. 50).

Defendant filed no assignment of error asserting that the verdict of the jury was excessive, or that it was arrived at through passion or prejudice, or that this casual statement of liability insurance affected the verdict in any way, shape or form.

DEFENDANT'S AUTHORITIES

Re: Liability Insurance Statement.

(Brief pp. 33-36)

SIMPSON V. FOUNDATION CO., 201 N. Y., 479; 95 N. E. 10. The judgment in this case was reversed but not on the grounds suggested by counsel. It was reversed on other grounds. (95 N. E. p. 13). Furthermore, the objections to testimony regarding liability insurance were improperly overruled by the trial court, and allowed to stand. In other words improper testimony was not stricken out.

IVERSON V. McDONNELL, 78 Pac. 202 (Wash.). Counsel for the plaintiff on cross-examination repeatedly asked defendant if he did not carry insurance on his men. The trial court overruled objections to such questions and compelled the defendant to answer. The appellate court very properly reversed the judgment. Plaintiff's counsel was guilty of reprehensible conduct, and the trial judge failed in his duty in compelling the defendant to answer the improper questions.

LOWSETT V. SEATTLE LUMBER CO., 80 Pac. 431 (Wash.). The conduct of plaintiff's attorney in this case was even more flagrant than in the Iverson case, and the trial court permitted the prejudicial questions. The judgment was and should have been reversed.

STRATTON V. NICHOLS, 81 Pac 831 (Wash.). In this case the conduct of plaintiff's attorney in injecting into the examination of jurors and witnesses statements indicating that defendant was insured in a casualty company was held such misconduct as to require a reversal.

BIRCH V. ABERCROMBIE, 133 Pac. 1020 (Wash.). Judgment properly reversed in this case for reprehensible conduct of attorney for plaintiff in pressing inquiry as to casualty insurance, even after the Court ruled that such testimony was incompetent.

SHAY V. HERR, 139 Pac. 604 (Wash.). Jud

ment properly reversed for exceedingly reprehensible conduct of plaintiff's attorney in referring to liability insurance in his opening statement to the jury, and in interrogating witnesses concerning the same, after repeated objections by opposing counsel.

CAMERON V. PACIFIC LIME & ETC. CO., 144 Pac. 446 (Wash.). Judgment properly reversed for improper conduct on the part of plaintiff's counsel in intentionally pursuing a witness on re-cross examination until he obtained an answer disclosing that defendant carried liability insurance covering the accident involved.

DAMERON V. ANSBORO, 178 Pac. 874 (Wash.). An examination of this case fails to disclose that any issue directly or indirectly concerning liability insurance was involved.

UNION PACIFIC R. CO. V. FIELD, 137 Fed. 14, 18. No question of liability insurance was involved in this case. The judgment was reversed on account of the admission of unsworn statements of irrelevant facts by counsel for plaintiff in his address to the jury.

WALDRON V. WALDRON, 156 U. S. 361; 39 L. Ed. 452. Suit for alienation of affections. Liability insurance not involved. A new trial was granted for improper conduct of plaintiff's counsel in addressing the jury. The opinion was written by Chief Justice White, who observed:

“Thus, the case, in its entire aspect, was seemingly conducted in such a manner as to render the illegal use of evidence possible, and to cause the harmful consequences arising therefrom to permeate the whole record, and render the verdict erroneous. Our conviction in this regard is fortified by the fact that although the unauthorized use of the evidence occurred in the final argument of the counsel for plaintiff who first addressed the jury, and was then and there objected to and exception reserved, the same line of argument, in an aggravated form, was resorted to by the counsel who followed in closing the case. Indeed, the language of this counsel invited the jury to disregard the finding of the court, by looking beneath the facts which were lawfully in evidence.”

PROPOSITION IV.

An Appellate will not reverse a judgment and grant a new trial where it appears that the losing party was not prejudiced by the alleged errors complained of.

Tanner, et. al. v. Harper, 32 Colo. 156; 75 Pac. 404

Holman v. Rayensford, et. al., 3 Kan App. 676;
44 Pac. 910.

Petajaniemi, et. ux. v. Washington Water Power Co., 124 Pac. 783 (Idaho).

Louisville Etc. Co. v. Sullivan Etc. Co., 27 So.
760 (Ala.)

Vandalia Coal Co. v. Price, 97 N. E. 429 (Ind.).

O'Neil Mfg. Co. v. Pruitt, 36 S. E. 59, (Ga.) 110
Ga. 577.

We quote a few excerpts from some of the above cases:

TANNER, ET. AL., V. HARPER, *supra*, (32 Colo. 156; 75 Pac. 404), was a personal injury case growing out of an accident in a mine. Plaintiff was awarded \$5,500.00 damages by the jury's verdict. On appeal, error was predicated upon statements of attorney for plaintiff to the jury directly charging that an **insurance company was the real party in interest**. The Supreme Court of Colorado in affirming the judgment of the trial court said:

“When the jury were being impaneled, one of the counsel for plaintiff stated that an insurance company was the real party in interest in defense of the suit. Counsel for defendants advised the jury that they should disregard the remark of counsel. On the examination of the jurors on their voir dire counsel for plaintiff, over the objection of defendants, were permitted to ask each juror whether he was acquainted with the insurance company in question, and whether he had been in its employ. If the statement complained of was erroneous, and was not cured by the ruling of the court, or if the questions to the jurors were improper, they are not sufficient to work a reversal if it affirmatively appears that the defendants were not prejudiced thereby. The great weight of the testimony on the question of the negligence of defendants in constructing the track, and also on the subject of the alleged contributory negligence of the plaintiff, was overwhelmingly in favor of the latter. He was very seriously injured. The ex-

tent of his injuries was such that the amount awarded by the verdict returned is not at all unreasonable. So it appears from the record that there was no close questions of fact in the determination of which the jury might have been unconsciously influenced by the consideration of extraneous and improper matter. We conclude, therefore, that it affirmatively appears that defendants were not prejudiced by the alleged errors, and hence cannot complain of their commissions. *Manigold v. Black River Traction Co.* (Sup.) 80 N. Y. Supp. 861.

The judgment of the district court is affirmed."

Like the *Tanner* case, *supra*, the case at bar is not encumbered by any close questions of fact. It is all one-sided,—in favor of plaintiff.

In *PETAJANIEMI, ET. UX., V. WASHINGTON WATER POWER CO.*, *supra*, (124 Pac. 783 (Idaho)), the Supreme Court of Idaho said:

"Another question has been urged here, and that is the remarks and argument of counsel for respondents, as made in the trial court. The record, containing different remarks and argument made by counsel in the course of the trial to which appellant has excepted, is too voluminous to insert in an opinion. We have examined it with care, and must say that it was of such a nature as could not well be approved by any court, and was calculated to prejudice the jury, rather than to furnish them any aid in the way of fact or argument upon which to base a verdict. If there was any doubt as to the justice of the verdict in this case, the court would

be justified in reversing the judgment on account of the prejudicial statements and arguments made by counsel for respondents (*Gladstone v Rustemeyer*, 123 Pac. 635); but, after an examination of the whole record, we are fully satisfied that the verdict in this case is eminently just, and that the respondents have not obtained any larger verdict than they were entitled to recover.

“We conclude that the judgment in this case ought to be affirmed; and it is so ordered.”

PROPOSITION V.

An Appellate court will not disturb a verdict for damages unless upon the whole case it affirmatively appears that the award was the result of passion or prejudice on the part of the jury.

On this proposition we believe the authorities are practically unanimous. We cite the late Arizona case of *INSPIRATION CONSOL. COP. C. V. LINDLEY*, 177 Pac. 24, 20 Ariz. 95, wherein it was held:

“We can only disturb a verdict for excessive damages when it appears that the damages are so excessive that the award cannot be sustained on any other theory than that it was the result of passion or prejudice on the part of the jury. It was for the jury to exercise an intelligent discretion in the award of damages, and there is nothing in the amount awarded to indicate that the verdict was the result of other than the exercise of a sound discretion.

“For the foregoing reasons, the judgment of the lower court is affirmed.”

In *CRANE V. FRANKLIN*, 17 Ariz. 476; 154 Pac. 1046 (On rehearing) Ross, C. J., said:

“The plaintiff sued for \$1,402. Evidence of his damages ranged from that amount down to \$600. The verdict of \$540, it would seem to us, is supported by the evidence. We have many times decided that where substantial evidence supports the verdict of the jury, this court will not disturb it.

“Judgment of the lower court is affirmed.”

In the case at bar, plaintiff sued for general damages in the sum of \$10,000.00, and for special damages for loss of time. The special damages proved amounted to \$700.00. The jury awarded him \$8000.00 which, considering the very severe injuries sustained was not excessive. Had the jury been prompted by bias or prejudice it might have awarded a much larger amount.

DEFENDANT'S SPECIFICATION OF ERROR VI.

Under Argument No. IV. p. 37 of its Brief, Specification of Error No. IV., defendant complains of error in the denial of physical examination of the plaintiff. The defendant admits that the Trial Court had no power to order an examination of the plaintiff, there being no statute in existence in Arizona authorizing such examination. The defendant, how-

ever, takes the position that because plaintiff offered the jury the inspection of an injury to his head that the Court thereby was vested with authority and discretion to order a general examination. It will be observed that the right of defendant to examine plaintiff's head, through experts or otherwise, was not questioned and was in fact granted. The defendant does not complain of a denial of an examination of plaintiff's head but only of denial of a general physical examination.

The law seems to be fairly well settled that where plaintiff offers an injured member in evidence, the defendant has a right to examine such member. The cases cited by defendant on pages 38 and 39 of its Brief are all cases on this point.

In the KENDALL case, the question involved was the error of the Court in refusing to compel plaintiff to submit his knee for examination after he himself had shown his injured knee to the jury.

The ROBERTS case, cited by defendant, is not in point, the rule in that jurisdiction being that the Trial Court had a right to order a physical examination.

In the HOLTON V. JANES case cited by defendant, an injury to plaintiff's head was shown to the jury; the defendant asked for permission to examine plaintiff's head and this right was denied by the Court. No general physical examination was demanded and that question was not involved. A

review of the authorities fails to disclose a single decision where it has been held directly or indirectly that the exhibition of an injured member to the jury authorized the Court to order a general physical examination.

The rule is otherwise settled in

Wheeler v. Chicago and W. I. R. Co., 267 Ill. 306;
108 N. E. 330-339,

where plaintiff exhibited an injured leg to the jury. The Court said:

“We do not think that the mere showing of the injured member to the jury gave the defendants the right to invade the privacy of plaintiff’s person and make him submit to an extended scientific examination of the same in the presence of the jury.”

The Specification of Error is without merit. The discretion of the Court extended only to the extent of allowing an examination of plaintiff’s head which was in fact done. (Tr. pp. 57-59).

DEFENDANT’S ASSIGNMENT OF ERROR NO. X.

(p. 102 Tr.), presented in Defendant’s Brief (p. 40) in Argument 5, as Specification of Error
VI.—Admission of Mortality Tables.

Error is alleged by defendant on the Admission of the Mortality Tables on the ground that there was no evidence of permanent injury. No contention is raised as to the Court’s instructions cover-

ing the use by the jury of these tables. (See Assignment X., p. 102 Tr.)

The Assignment is untenable. The question has been decided adversely to defendant in the late opinion of this Court in the case of **United Verde Extension Mining Company v. Koso**, 273 Fed. 369; decided May 2, 1921; re-hearing denied June 6, 1921.

The rule is settled that where there is any evidence tending to show injuries of a permanent character Mortality Tables are admissible. *United Verde Extension Mining Company v. Koso*, Id.

See 19 R. C. L., p. 218, paragraph 5, Title "Mortality Tables," where it is said:

"The tables are admissible where there is some evidence tending to show that the injuries received were of a permanent character or even where the evidence is conflicting as to whether the injury received was of such a character." See note in 40 L. R. A. 557.

The question of permanent injury was for the jury and was left to them by appropriate instructions. (pp. 87-88 Tr.)

Defendant's claim that there was no legal substantial evidence of permanent injury is wholly without foundation. The record discloses that plaintiff suffered a fall into a ten-foot concrete pit. A fifty-pound iron roll fell upon him. He was rendered unconscious, his forehead fractured; a de-

pression made in the bones of the back of his head. (Pages 36-37 Tr., and see Supplemental Statement of Facts, this Brief.) Of the effects of this injury, plaintiff testified: “ * * * the back of neck and of my head is sore. There is a lump on my skull and my nerves is gone. My head aches and my neck hurts ever since. I never had a headache or backache or bad nerves before.” (Page 37 Tr.)

“I suffer with the back of my head and neck, have had headache every day, cannot turn my neck around any further than (indicating) or back; * * * I never had a headache or backache before. * * * I wasn't able to get out and hunt a job. There was no light work I could get around there. I wasn't able to pitch hay and wouldn't undertake it. I could not do clerical work. * * * I am nervous, my hands and legs tremble, which I never did before.” (pp. 42-43 Tr.)

Dr. J. B. McNally, for plaintiff (pp. 44-47 Tr.) testified in substance that in September, about four months after the injury he examined plaintiff, found an ulcerated injury to his forehead, a depression on the left side of his head in the posterior region, and noticed a fine or muscular tremor all over his body. His neck muscles were apparently very tender, slightly rigid where attached to the bone. “I concluded there was probably a concussion of the brain or some part thereof that may have set up the tremor. I examined him again within the last week. * * * His nervous condition was very

slightly exaggerated, I think. * * * Well, I believe the cells of the brain were disarranged and their physiological function was disturbed.

“Defendant’s Attorney: And that, you say, will continue or won’t it clear up?

Witness: I think it will continue in a man of his age.”

Harry Garrison, for plaintiff, (pp 51-52 Tr.), testified: “He (referring to plaintiff) is apparently a changed man from what he was before, physically and mentally. He has been round my shop when I was working and when I asked him to hand me a tool, he would miss it and grab around before he got it, shaking all the time. * * * During the three years I knew Littlejohn previous to this accident, he was apparently healthy. * * * His nervousness and shaking before the injury were not noticeable.”

Sarah Littlejohn, for plaintiff (pp. 52-54 Tr.) testified: “He (referring to plaintiff) has not been working since his injury. I have observed a nervous condition; he is restless at night, gets up and walks the floor and puts his hand to his head. His hand shakes; he cannot get his coffee to his mouth without shaking. * * * Before this injury * * * he was generally a hard working man; never sick or nervous or sleepless and worked continuously.”

Defendant, through its experts, did not attempt to deny the permanency of plaintiff’s physical condition nor the skull injuries which he and Dr. Mc-

Nally testified to. X-Ray plates of plaintiff's skull, which defendant's doctors had taken, were not put in evidence, neither did they testify except on cross-examination concerning their examination of Mr. Littlejohn which they made during the trial.

Dr. Thigpen, for defendant (pp. 65-69 Tr.) stated that some time after the injury, he made an examination of Mr. Littlejohn and found a subject who, in his opinion, was a case of premature senility, who had a recent injury. On cross-examination, the doctor admitted that he had not found any chronic trouble which might have brought on this so-called premature senile condition and that shock and other causes might tend to produce the condition of senility.

Dr. H. T. Southworth, for the defendant, (pp. 69-73 Tr.) gave it as his opinion that Mr. Littlejohn was suffering from premature senility, and that his present nervous condition was not solely attributable to the injury. On cross-examination, he was unable to give any reason for this condition except that the plaintiff had been at hard work during his lifetime. On direct examination, Dr. Southworth stated that Mr. Littlejohn's condition could not be relieved by medical treatment. He admitted on cross-examination that plaintiff had a pulse of 128 to 134 when his normal pulse should have been 80 to 90.

From the above excerpts from the evidence, it will be seen that Mr. Littlejohn's condition, as

testified to at the trial was admittedly of a permanent character. Plaintiff and his doctor testified that his physical condition was a result of the injury and all of plaintiff's evidence tended to establish this. The defendant merely sought to show that plaintiff's condition resulted from other causes than his injuries. This was a question for the jury, wholly and entirely.

AUTHORITIES CITED BY DEFENDANT

Practically none of the authorities cited by defendant support its contention, and for the most part may be relied upon to support plaintiff's position.

The discussion of Mortality Tables in *KERRIGAN V. PENN.* is merely dicta. The *ROONEY* decision holds the introduction of life tables proper and that the question of permanent disability is for the jury. To the same effect is *CITY OF FRIEND V. INGERSOLL*, cited by defendant.

The decisions cited on page 43 of Defendant's Brief can be analyzed as follows: In the *LEACH V. DETROIT* case, plaintiff's own evidence showed the injury to be "trifling." In *TENNEY V. RAPID CITY*, the record disclosed no evidence tending to prove permanent injury. The Texas cases of *TEXAS & N. M. RY. COMPANY, V. DOUGLAS*, and *CITY OF HONEYGROVE V. LAMASTER* are not in point, for the reason that in that jurisdiction, there is a rule making Mor-

tality Tables inadmissible except in case of death or total disability.

The question of the introduction of Mortality Tables is not involved in the STEVENS V. N. J. R. R. case. Moreover, in that decision, it was conceded that plaintiff would, in all probability, recover from a paralytic attack resulting from the injury. Here it is admitted that there is no cure for plaintiff's condition.

The case of KLEIN V. PHELPS does not involve the admission of Mortality Tables. The decision simply holds that where plaintiff suffered an injury to his head, etc., the result of which was to render him nervous and weak, and a physician stated he might never recover from his injuries, that the verdict for him would not be disturbed.

DEFENDANT'S ARGUMENT VI.

(Brief p. 45.)

We have covered the points raised in Defendant's Argument VI. under Propositions II. and III. aforesaid.

In passing, we desire to call this Honorable Court's attention to the remarkable statement made by defendant's counsel on page 47 of its brief to the effect that plaintiff did not exercise reasonable care or caution in going upon the staging over the concrete pit to install the heavy bolt which he was carrying. The uncontradicted evidence in the case shows that plaintiff was directed

personally by defendant's foreman to do exactly what he did, that is to say, take up a large bolt, carry it out on the planks and install it as directed. Plaintiff did not select the planks or even place them over this open concrete pit, but did exactly what he was told to do by defendant's foreman, and had a right to rely on the defendant performing its duty in providing a safe staging for plaintiff to walk upon with said bolt in order to install the same. However, all questions relating to plaintiff's negligence or lack of negligence were settled by the jury's verdict.

DEFENDANT'S ASSIGNMENT OF ERROR NO. XII.

(p. 103 Tr.), Presented in Defendant's Brief page 52, in Argument 7, as Specification of Error VIII.

ARGUMENT ON VAULE OF DOLLAR

This Specification of Error is wholly without merit and unsupported by any reason or authority. The rule is well settled that counsel in a personal injury case, may in his argument to the jury state what is common knowledge, that two dollars now is only equal in purchasing value to what one dollar was five or ten years ago.

Washington & R. R. Co., v. La Fourcade, (1919)
48 App. D. C. 364;

This case is practically on all fours with the case at bar. Counsel for the plaintiff, in speaking to the

jury, stated "That \$10,000.00 now is only equal to \$5,000.00 five years ago." The Court not only held the argument to be proper, but stated that it was competent for the jury to take into consideration the present value of the dollar, as such matter was within the knowledge and experience of men in general.

In the case of *HURST V. C. B. & Q.* (Mo. 1920), 219 S. W. 566; 10 A. L. R. 174, it was held that the courts would take judicial notice "That money to-day has much less purchasing power than it had twenty or even ten years ago."

Numerous cases to the effect that courts and juries may take into consideration the purchasing power of money are cited in 10 A. L. R., Note, p. 179, and in '3 A. L. R., p. 610.

The Specification of Error is frivolous. Counsel for plaintiff did not state as a fact that \$10,000.00 is not worth as much as \$5,000.00 a few years ago, but merely called the jurors' attention to that fact. The argument was proper and is upheld by every authority where the question has arisen.

DEFENDANT'S ASSIGNMENT OF ERROR XV AND XVI.

(Pages 104-105 Tr.)

INSTRUCTIONS ON PERMANENT INJURY

Presented in Argument 8, page 54, Defendant's Brief, as Specifications of Error XI and XII.

In replying to defendant's argument in support of the above assignments, plaintiff will not again review the evidence, but merely refer to the facts disclosing permanent injury presented under reply to Defendant's Argument 5 re admission of Mortality Tables, p. 46, et. seq. this Brief.

The uncontradicted evidence disclosed a permanent injury. There was direct testimony that plaintiff would not recover. Moreover, the character of the injuries received by plaintiff were such as to indicate that he would never recover. No other inference could be drawn from the evidence. Plaintiff's physical condition at the time of the trial, six months after the injury was grave. He was broken down, his nerves gone; he was unable to work, suffered constantly with headaches. His whole body was shaken by a nervous tremor. This condition was shown to be a result of the injury. The permanency of plaintiff's physical condition was not put in issue by the defendant. It was admitted as incurable. Defendant's only attempt was to avoid liability on the ground that this condition was the result of other causes. This was a question for the jury and was decided adversely to defendant. The Court's instructions were eminently proper and fairly presented the question of permanent injury to the jury. The trial court, out of an abundance of caution, stated: (p. 89 Tr.) “* * * Future damages can only be awarded in a case when the evidence shows it to be a reasonable certainty.”

The law is settled in personal injury cases to the effect that it is ordinarily a question of fact for the jury to decide as to the nature and extent of the injury. Volume 8, R. C. L., p. 656, Par. 198, Title "Damages."

"In personal injury actions, it is ordinarily a question of fact for the jury as to whether the plaintiff was injured, and the jury should decide also as to the nature and extent of the injury."

Where there is a conflict of evidence, the question of the permanency of injury is for the jury.

Remsnider v. Union Savings & Trust Co., (Wash. 1916) 154 Pac. 135, 137.

The instructions leaving it with the jury to assess damages for permanent injuries is proper, though there is no direct evidence that the injury is permanent, where there is evidence from which the jury might conclude that the injuries were of a permanent character.

Louisville & N. R. Co. v. Williams, 51 N. E. 128; 20 Ind. App. 576.

The Court's attention is directed to the following cases where instructions similar to those given by the trial court were approved under facts substantially the same as those at bar.

Chicago & E. I. R. Co. v. Filler, 62 N. E. 919; 195 Ill. 9.

Cicero & P. St. Ry. Co. v. Brown, 89 Ill. App. 318. Aff. 61 N. E. 1093; 193 Ill. 274.

Fishburn v. Burlington & N. W. Ry. Co., 103 N. W. 481; 127 Iowa, 483.

Ballard v. Kansas City, 86 S. W. 479; 110 Mo. App. 391.

Kenyon v. City of Mondovi, 73 N. W. 314; 98 Wis. 50.

The decisions cited in Defendant's Brief, pages 55-56, have no application to the facts in the case at bar.

In the WHITE case, there was a special finding by jury to effect that injury may be permanent.

The MEETER case is not reported in 75 N. Y. S.

The injury in the FILER case consisted of an inflammation to plaintiff's muscle which appeared to be in good condition at time of trial, the only evidence being that there was a possibility of its recurrence.

In the TWEEDY case, the plaintiff's testimony tended to show only temporary injury, while defendant's witnesses testified that the plaintiff was perfectly normal.

In the MORRIS case, it was admitted that the operation complained of had cured plaintiff. She was allowed damages for the loss of the organ removed, but naturally not for permanent injury since the operation had cured her trouble.

In the SNYDER decision, the injury consisted of a bruise to the back and there was no evidence of permanent injury.

The POLLOCK case appears to be a divorce action and has no application.

The STROHM decision passed upon the admissibility of speculative evidence by experts as to what might happen.

In the EASTHAM case, it was admitted that plaintiff would recover full use of his arm within a year.

It appears from the facts in the GIFFORD decision that the plaintiff was normal and fully recovered at the time of trial. The doctors' testimony merely dealt in possibilities as to what might result from the injury.

The holding in the McNEILL case is simply to the effect that mere proof of injury which in and of itself is not essentially permanent is insufficient as proof of permanent injury.

Moreover, the question raised by defendant has been settled in UNITED VERDE EXTENSION MINING CO. V. KOSO, 273 Fed. 369, where similar instructions were approved by this Court.

“We may say, however, that upon the question of damages the instructions show that the court told the jury explicitly that they should consider whether the injuries, if any, were permanent, to what extent, if any, plaintiff had suffered, whether he had been disabled or incapacitated to earn a living at all, the age of plaintiff, what his occupation and income were, and whether his

employment would have continued.” (273 Fed. p. 373).

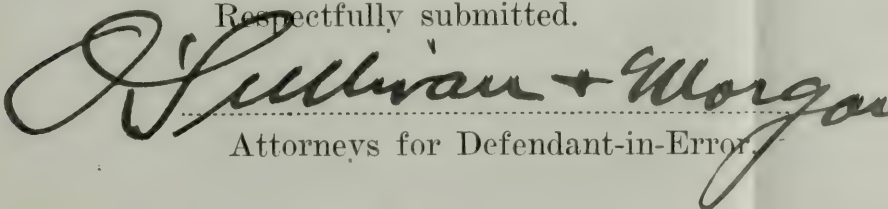
Defendant's specifications of error not being based on the record are of no avail and must be disregarded.

CONCLUSION

We are satisfied that a perusal of the evidence and record in this case will show that no prejudicial or reversible error appears. The Trial Court at all stages of the case properly safe-guarded the rights of defendant. His instructions to the jury embraced and comprehended every essential and material feature of the case.

Under the Employer's Liability Law of Arizona, plaintiff at the time of his injuries, was engaged in a hazardous occupation, and while so engaged in carrying out the direct orders of the defendant company, he was seriously and permanently injured. The jury awarded him damages. The errors complained of were presented fully to the trial court on defendant's motion for a new trial and a new trial denied. Substantial justice has been accomplished in this case and the judgment of the trial court should be affirmed.

Respectfully submitted.


Attorneys for Defendant-in-Error.

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED VERDE EXTENSION MINING COM-
PANY, a Corporation,
Plaintiff in Error.

VS.

JOHN T. LITTLEJOHN,
Defendant in Error.

Reply to Brief of Defendant in Error

UPON WRIT OF ERROR IN THE UNITED STATES DISTRICT
COURT IN THE DISTRICT OF ARIZONA

FAVOUR & BAKER, of Prescott, Arizona,
Attorneys for Plaintiff in Error.

Filed this.....day of....., 1921.

.....
Clerk U. S. Circuit Court of Appeals.

Service of copy of within Brief is acknowledged
this.....day of October, 1921.

.....
Attorneys for Defendant in Error.

FILED

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F. D. MONCKTON,
CLERK

the facts brought the accident within the Liability Law.

Counsel admits herein that plaintiff could work; counsel states he "could only perform light work" (p. 4) and there was "no such work available."

The quotation (p. 8) of Sec. 3147 cited by plaintiff shows legislative intention that employment must be "in or about the **operation** of smelters."

Any inference that the accident in this case was in an "open pit" as contemplated by the Statute in using that term is an incorrect and unwarranted interpretation, because the judge of the lower court understood the application and so explained (Tr. 80); also:

NOTE ON WORKMEN'S COMPENSATION:

What is a Mine within the meaning of the Acts; In 11 Amer. Law Reports 154:

Generally with respect to the term "mine" it is stated in 18 R. C. L. 1092:

A mine in its specific sense, is a work for the excavation of minerals by means of PITS, SHAFTS, etc., as opposed to a Quarry where the whole excavation is open * * *

As originally used, the word "mine" was exclusively connected with underground workings, but both in this country and in England, in later times, the word has received an enlarged meaning, and under the

modern construction it is not limited to mere subterranean excavations or workings, but includes, for example, beds of clay or limestone, reached by OPEN WORKINGS and workable only from OPEN CUTS.

There are certain excavations which are termed neither mines nor quarries, as for instance places where clay is being dug out for bricks; such places are frequently called PITS, and also OPEN WORKS.

Plaintiff seeks to give to the clause "in and about" mines or smelters, a meaning which comprises work "in the outside vicinity of" mines or smelters, which would include all manual work on the surface of a mining claim, and include accordingly all manual work in the hotel or boarding house and other welfare agencies conducted by the employer on the mine or near the smelter, and all other manual work performed on the ground such as janitor work in an office building near the smelter or on the mine of an employer. There is no decided case based upon and upholding constructions of the Arizona Liability Law which even leans to such an interpretation. All the cases which have been decided favorably to plaintiffs upon appeals involving the question of Employers' Liability of Arizona have been causes where the plaintiffs were employed, in the true sense, "in and about" mines or smelters, that is, engaged in hazardous occupations in underground workings, in or about **a mine**, or engaged in hazardous works "in and

about" a **smelter** as that term is understood, and is interpreted in *Calumet & Arizona v. Chambers*, as well as in the reasoning of other decisions.

In the **Chambers** case the Court states, at page 58: "The complaint shows that the defendant was engaged in operating a **smelter** and machinery incident thereto; that at the time of the accident * * * the plaintiff was in the service of the defendant engaged in performing his duties **about** the said smelter including the duty * * * in event of an emergency or accident to assist and aid in restoring conditions and putting things in working order.

"The surroundings in which plaintiff was performing his duties are described in the complaint with sufficient fullness to show that the risks and hazards assumed by the employees are great and **inherent** in the occupation, and unavoidable by the workmen."

At page 60: "The answer sets forth in detail the circumstances surrounding the place of the accident, the employment engaged in at the time and the apparatus necessarily used for the purpose * * *

"That the floor is made almost entirely of sheet iron and in said floor are many openings, small and large, made necessary by the mechanical requirements of operation of appliances used in the **smelting processes** of defendant."

The Court's use of the word "about" clearly shows it does not mean "outside in the vicinity" or incidental work, but about the employment of smelting and smelting processes, and in the smelter.

Moreover, in the cases in which, on appeal, plaintiffs have been denied a recovery, the plaintiffs were held to be **outside** the mine when on the surface (Espinoza), at p. 751 "the deceased in the present case was not at work either in or about the mine at the time," and outside the hazardous part of the business of railroading when not subject to its inherent risks or conditions. In none of the cases has a plaintiff employed by a mine owner or a smelter owner been permitted to recover under the Employers' Liability Law of Arizona, for any accident in his occupation when that was not, as required by the Constitution and Sec 3154, R. S. A., a "**hazardous occupation in mining or in smelting**," that is, work "in and about" a mine or a smelter and **inherently** hazardous as such. If the term "in and about" were given the unwarranted meaning "anywhere in the vicinity of" and work incidental to mines, machinery operation, etc., then Mathews would have been given a right of recovery, since the manual nature of work was not the controlling factor in the reasoning (see statement in the Espinoza case) and he was unquestionably engaged in work essential in railroading business, declared hazardous; and the above quotation from the Espinoza case would be erroneous and overruled. The case of Scullion v. Cadzow Coal Co. (51 Scot. Law 39) cited in Note, p. 154 in Vol. 11 Am. Law Reps., is another case where a laborer was at the pit head:

"An employee engaged as a surface laborer at the

pit head was not employed in any process of "mining" within the meaning of the English Workmen's Compensation Act.

"What then, is, in plain language, the meaning of the expression 'the process of mining?' I think there can be no doubt the meaning of that expression is the obtaining of mineral from an excavation in the earth which necessarily implies two things: (1) The actual cutting or hewing of the mineral. (2) Its removal to the surface. In no part of that operation was appellant engaged."

While the defendant's position is that its points would cover the case whether recovery was sought under either paragraph of Section 3156 R. S. A., attention is invited to the fact that on pages 10 and 11, counsel continues his alternative that the plaintiff was working either in a smelter (Sec. 3156 par. 8) **or** in mills, shops, etc. (Sec. 3156 par. 10), or a mixture, what is popularly termed a "straddle." If such an alternative or mixture were permissible in the pleading, the uncertainty was eliminated by the instructions of the judge which confine the jury to employments under par. 8 of Sec. 3156 (Tr. 77 and 78). The plaintiff did not except to the instructions, and he cannot be permitted to argue that par. 10 may be an alternative possibility when the Court's instruction took no account thereof, limited the jury to par. 8, and the question was never submitted to the jury.

Proposition II (page 11)

All cases under other laws, cited by plaintiff, are distinguishable for the reason the Arizona law is unique in **unrestricted liability** and consequent clauses restricting it to accidents **due to conditions of employment and inherent risks**; and the **various state laws have specific provisions upon which these decisions are based**; for example:

In the **Boody** case: There is no provision about being due to a condition of employment or inherent hazard of occupation; the New Hampshire act simply stated "to workmen engaged in manual and mechanical labor in the employment," and restricts liability.

Larsen Case (p. 15): The New York statute declared that there should be a "presumption that a claim under the Act came within the Act unless there was substantial evidence to the contrary," and the Court simply held there was no evidence to the contrary, plainly indicating there might have been and the decision might have been different.

O'Toole Case: This is clearly based upon statute which gave an "extended meaning" to the word "factory," and is therefore not in point.

Pellerin Case (p. 16), Federal: **Plaintiff's work was inside the mill, on machinery.** The paragraph preceding plaintiff's quotation throws a different light on the application of the decision: "Moving the cupboard, if it is to be considered by itself, without re-

gard to any work included within the plaintiff's general employment, is certainly not shown to have been work 'in connection with or in proximity to * * * machinery.' It had no connection with any machinery whatever, nor can we believe it was 'in proximity to' any, in the statutory sense, **even if such machinery was to be found inside the building to which the platform belonged.** If plaintiff had been employed to do such work as never required him to enter this building belonging to the mill and containing machinery he would not have been entitled to the statutory remedy." The testimony shows Littlejohn in his work for the company was never required to enter any building where machinery was operating.

The Illinois and New York cases cited by plaintiff are likewise based upon entirely distinctive statutes **limiting the liability, and containing no provision that the cause must be due to a condition of the occupation** and inherent risks, and which make detailed definition of the hazardous occupations and cover broadly many employments not included in Arizona Law, for example:

Gibson v. Industrial Board (p. 20): The case is not pertinent, because of the statutory provision; plaintiff was engaged in an occupation covered by the statute as "any enterprise in which explosive materials are manufactured, handled or used." There is cited, however, the case of *Vaughan Seed store v. Simonini* (Ill.) 114 N. E. 163, which positively and clearly states and establishes defendant's ground in the case at bar.

In that case the proprietor had a salesroom with freight elevator; a warehouse at another point, and a farm on which greenhouses were maintained. The law made "building or maintaining any structure" a hazardous occupation. Plaintiff, a laborer on the farm, argued that defendant was **maintaining** a greenhouse on the farm, and a hazardous business in the city, and came under the law.

The Court: "His employment was not different from that of the ordinary farm laborer. His injury arose out of that employment (kicked by horse), but had no connection with the business of maintaining and using a greenhouse. Assuming that maintaining and using a greenhouse * * * was engaging in a hazardous occupation **the Act does not apply to all business of the employer without reference to its connection with the particular extra hazardous business.**" "To give the Act any other interpretation would render it unconstitutional."

"The object of sec. 3 was the better protection of employees exposed to greater danger by reason of their employment in these extra-hazardous occupations, and it was not intended that employers engaged in such extra-hazardous occupations should for that reason be subject to any greater liability to their employees not engaged in such occupations than other employers under the same circumstances." "Plaintiff was not exposed to any of the dangers arising from such extra-hazardous occupations." "Whether or not defendant as to any part of its business was subject to the provisions of the Act, it was not subject as far as plaintiff was concerned."

Fogarty Case (p. 22): The statute giving a **"presumption"** that an accident came under the Act in absence of evidence to contrary applied here, as well as the other statutory provisions different in toto from Arizona.

N. Y. Central v White (p. 23): This decision shows positively the position of the U. S. Supreme Court construing a clause which is identical in substance and meaning with the Arizona Section 3154; and makes conclusive the point of defendant that it is the occupation of the employee which determines, and not the principal business of the employer.

The Federal Employers' Liability Act (35 Stat. at L. 65; and 36 Stat. at L. 143; U. S. Comp. Stat. Supp. 1909, p. 1171) provides:

"That every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury **while he is employed by such carrier in such commerce** * * *

This is similar wording to that of the Arizona Law, Sec. 3154, providing that any employer in hazardous occupations in smelting, etc., shall be liable for injury **"of any employee in the service of such employer in such hazardous occupation."**

The U. S. Supreme Court has decided that this means not only that the employers must be engaging in interstate commerce but that the employee was at the time also engaged in such commerce, and that work on construction of instrumentalities intended for use when completed in such interstate commerce

is not work so related to interstate transportation as to be a part of it.

Pederson v. Del L. & W. 57 L. Ed. at 1127 and 1128: Plaintiff was carrying bolts and rivets to a bridge which was to be repaired. "That defendant was engaged in interstate commerce is conceded; and so we are only concerned with the nature of the work in which plaintiff was employed at the time of his injury."

"Of course we are not here concerned with the construction of tracks, bridges, (etc.), which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

Chg. B. & Q. v. Harrington, 60 L. Ed. 941 (Justice Hughes): Plaintiff was engaged in switching coal in Kansas City Terminal Yards. "So also, as the question is with respect to the employment of decedent at the time of the injury, it is not important whether he had previously been engaged in interstate commerce, or that it was contemplated that he would be so engaged after his immediate duty had been performed. That duty was solely in connection with the removal of coal from the storage tracks to the coal shed, or chutes, and the only ground for invoking the Federal act is that the coal thus placed was to be used by locomotives in interstate hauls * * * Was the employee at time of injury engaged in interstate transport or in work so closely related to it as to be practically a part of it. Manifestly, there was no such close or direct relation * * *"

New York Central v. White, 61 L. Ed. 670 (Justice Pitney): "Plaintiff was on duty at the time, and at a place not outside of the limits prescribed for performance of his duties * * * was an accidental injury arising out of and in course of his employment."

"The admitted fact that the new station and tracks were designed for use, when finished in interstate commerce, does not bring the case within the Federal act. The test is 'Was the employee at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it' * * Decedent's work bore no direct relation to interstate transportation, had to do solely with construction work, which is clearly distinguishable, as was pointed out in *Pedersen v. D. L. & W.*"

Applying the principle of this reasoning and decision of the Supreme Court to the Arizona Law with the same wording, the employee must be shown to be engaged in a hazardous occupation at the time of the injury, where an employer is engaged in a business which comprises both hazardous and non-hazardous occupations. And further, work on construction of any instrumentality to be used in the hazardous business is not work in such business or hazardous occupation.

Bravis v. Chg. M. & St. P. CCA 8th, 217 Fed. 234: Plaintiff was engaged in construction of a bridge on a cut off being constructed to straighten a curve. Men rode to work on a hand car on the main line which was interstate and plaintiff was injured by falling from the car and being run over.

“The mere fact that it was the purpose and intention (to use in interstate commerce) at some future time did not make it an instrumentality . . . The argument that the building of the cut-off was the mere correction or prevention of a defect or insufficiency of the defendant’s instrumentality for conducting interstate commerce is too remote and inconsequential to convince. The building of such a cut-off is new construction for use in such commerce.”

Those employed in the construction of roadbeds, rails * * * and other instrumentalities which are intended for use in interstate commerce, but have never been and are not in use therein, are not employed in such commerce and are not protected by that act.

ARIZONA CASES

Mendez Case: Counsel cuts off his quotation (p. 24) at the right place for the support of his point, but at the wrong place if the Court is to get the full and real extent of the “conditions;” these additional conditions are precisely what this defendant urges must be found present to give right of recovery under the law:

“that the accident causing the injury suffered arose from the **dangerous and hazardous nature** of the service required in the industry as such is ordinarily carried on, and in carrying on such service necessary risks and dangers **inherent therein** are present as a menace to the workman without knowledge of which and without incurring the dan-

ger of injury therefrom he cannot perform such required service."

Mendez was working underground in and about the mine.

The following quoted in the **Mathews** case from New York decisions, shows clearly that the Supreme Court of Arizona does not consider the "principal business" of the employer has any application to the Arizona Law, and that an employee of a proprietor of a so-called hazardous industry may be at times in a hazardous occupation and at other times not:

"Where * * * the employee's ordinary duties and accustomed scope of activities do not come exclusively or predominantly within the category of enumerated employments and only casually and incidentally does he do work fairly falling within that category, his right to remuneration must hinge on a finding that he sustained injury while actually and momentarily doing work named in the statute, even though he at times did work embraced within the statute."

Proposition III (p. 26)

This proposition concerning work fairly incidental is not applicable to this case. **If it applied as plaintiff contends then the Mathews case itself is wrong** because there (at page 287) it is admitted that the employee was engaged in work essen-

tial in the railroad business of his employer; as also would be the above quoted statement from the New Cornelia decision of this Court, and the decisions of the U. S. Supreme Court above cited, especially the Harrington case, construing the Federal Employers' Liability Act to apply only in cases where the employee proves himself to be in an occupation in interstate commerce, the fact that the employer is so engaged not being the controlling feature. There is no question here of a "bar" to other action, the plaintiff had the common law remedy which, as modified by Arizona law, has been said to be as favorable to the employee as are the Employers' Liability laws in many states.

Vogt Case (p. 29): The law of Illinois specified **surface** mining. Plaintiff was employed on a hoisting engine used to lift coal from the mine.

Conroy Case (p 31): This was cited by defendant to show the distinction between means completed and those in process of construction. It is supported by Federal Supreme Court cases herein reviewed.

Wendt Case (p. 31): Plaintiff misinterprets this. The principal business was non-hazardous; a portion of business was hazardous and accident occurred there, and the employer tried to evade on ground his principal business was non-hazardous.

On Defendant's Assignment of Error V. (p. 37)

No assignment of error is available on the ques-

tion of excessive verdict in this Court. This point was raised in motion for new trial.

Reply in Regard to Defendant's Cases on the Matter of Insurance

Iverson Case (p. 38): Counsel misreads when he states "the trial court overruled objections to such questions." At page 204, "It is true the learned trial court properly struck out the answer and instructed the jury not to consider it."

Stratton Case (p. 38): This is misread by plaintiff; objections were sustained in lower court; at page 83, the Court: "in face of the fact that in nearly every instance the objections were sustained."

Dameron Case (p. 39): Counsel states they found nothing re insurance; the statement is found at page 878 (6).

Proposition V. (p. 43).

Excessive damage is not a question for consideration by this Court, under its rulings.

Proposition VI. (p. 44).

Counsel states defendant asked for a "general physical examination." Defendant's request was (page 58 Tr.) "We desire to examine the plaintiff in so far as the condition of his head may make it necessary in order to show what the result of that alleged injury was."

The Wheeler case (p. 46) shows that plaintiff

agreed to an examination, but defendant insisted on particular physicians. There was no such condition in the case at bar; defendant asked for physician to be appointed by the Court.

On Defendant's Assignment X. (p. 46)

The citation of the Koso case is not in point as a wholly new state of facts is presented in this case. Plaintiff begs the question by assuming the existence of evidence; that is the point raised, that there is no evidence, and only speculation and guess, as to the continuance in future of the alleged condition due to the accident; is the jury to judge the sufficiency of evidence.

The testimony quoted by counsel is applicable to temporary injury which any person might have for a long time after a fall or other accident. His Dr. McNally (p. 46 Tr.) said a concussion takes place when one is knocked senseless and is not always attended by serious results. "I don't think this injury caused any fracture of the inner table of the skull."

Garrison (a friend) states how Littlejohn acted when at work, whereas Garrison states he never saw him at work before the accident (Tr. 52).

The statement that the defendant did not attempt to deny permanence is true, because there was none to deny. But if intended to mean there was no evidence offered to show that injury was temporary

only, attention is invited to testimony of Dr. Moore (p. 63 Tr.); of Dr. Thigpen (p. 68 Tr.); of Dr. Southworth (p. 71 Tr.), and to testimony of Dr. McNally on cross-examination (p. 46 Tr.).

Defendant was refused the physical examination requested; how could it adduce further evidence?

Argument VI. (p. 52).

Counsel admits that plaintiff was directed to take a bolt over the **planks**. He intimates some negligence of defendant which was not brought out in evidence and could not be, under the decision in *Cons. Ariz. v. Gonzales*, 21 Ariz. 628. There is no evidence the staging was not safe; if there is any inference from the evidence it is that the men themselves made their own staging and it was a part of the work and duty of each to take reasonable precautions not to all step on the same plank. Further, if defendant was at fault, plaintiff's remedy was the common law and not Employers' Liability, where the cause must be "a condition of the employment." On authority of the *Gardner* case (21 Ariz. 206, p. 47 of Brief), and under instructions to the jury (Tr. 46), on the uncontradicted evidence we submit the plaintiff did not prove he was not negligent.

Even plaintiff's strongest authority says it is **ordinarily** a question of fact for jury on extent of injury. There was no conflict of evidence plaintiff states it was uncontradicted.

Replying to Plaintiff's Comments on Cases (p.56):

In re **Remsnider** Case: Two doctors stated positively there was permanent injury and two that there was not. This was held to be "conflict."

In **Meeter** Case (p. 55), the citation should be 18 N. Y. S. 561.

Tweedy Case (p. 57): Counsel says testimony in Tweedy case tended to show only temporary injury. One of the Tweedy's doctors said "there was a deposit about the spinal column and excessive soreness and the present condition will become permanent."

If counsel admits that such testimony, where claimant's own doctor stated that his condition would become permanent, tends to show only temporary injury, how can he claim that the evidence is uncontradicted showing permanency in his own case where there was not a word showing any condition would be permanent, but only Dr. McNally's statement "I cannot tell," referring to the tremor only.

Snyder Case (p. 57): Same comment applies as in Tweedy case. Engineer had neurasthenic condition. He testified that since he had walked with cane and had dragging of the foot and was thus at trial.

Counsel says "there was no evidence of permanent injury."

Clifford Case (p. 58): Testimony showed head injury was a depression back of ear, and headaches and earaches were testified to. Physician said he would expect convulsions

and severe periodical pains in head and general nervousness.

Counsel says it appears the plaintiff was "normal and fully recovered."

The Egich case cited by plaintiff in oral argument, was considered upon petition for rehearing before this court in the New Cornelia v. Espinoza case, and this Court stated it did not affect its opinion. The case has no application here and is not contrary to the position of this defendant; it is rather in support of the interpretation of defendant since the injury in that case occurred while plaintiff was working "in and about" a mine, being underground and recovery was allowed for an injury which unquestionably occurred **about** the mine; also, this Court would not be affected by any alleged and uncertain change in decision unless and until the U. S. Supreme Court changes its decision with reference to the necessity that an accident be due to **inherent** dangers of the hazardous occupation.

In the New Cornelia case the personnel of the Court was the same as in this case and extended quotations or interpretations are unnecessary, but the following further show that it considered the provisions of the Law relative to **accidents due to inherent risks and conditions of employment in and about a mine** to be effective and restrictive of recovery to accidents so due and occurring:

“It was necessary for the deceased to be in dangerous proximity to at least one of these explosives when he was at work **in the mine**, where such explosives were being used by the defendant in prosecuting its **mining operations**; but the deceased was not at work **in the mine** at the time of the explosion causing his death, and he was not in dangerous proximity to the explosives being used **in the mine**. He was on the surface, where **no mining operations were being carried on** by the defendant * * * The hazardous occupation in which the deceased was engaged was **in the mine**, and **not on the surface**.”

This last clause seems decisive; although the plaintiff's regular occupation was hazardous because “in and about” the mine, he was **not** in a hazardous occupation when on the surface and near or in the vicinity of the mine, where there are of necessity certain operations or work being carried on incidental to the hazardous work **in and about** the mine; “the deceased * * * was not at work either in or about the mine at the time of the accident.” This is a clear and decisive statement that this court does not interpret the clause “all work in and about” to include work that is merely in the indefinite vicinity, even where, as in the New Corvelia case the work in the immediate vicinity was intrinsically hazardous. And further, “the risk or hazard which the deceased incurred in being near

the fire on the surface **was not a risk or hazard inherent in the work in the mine.**"

This Court kept in mind the provisions of the Arizona Constitution and of Sec. 3154, R. S. A., which restrict the unlimited liability to "all hazardous occupations **in** mining and smelting," and that the subordinate clause of Sec. 3156 "all work in and about " was to be interpreted reasonably and harmoniously with the Constitutional and Legislative declaration and intent to apply the Act only to such occupations about mines and smelters as were hazardous because of inherent dangers and to accidents due to conditions of employment in such inherently dangerous occupations in mining and smelting.

It is submitted that this defendant asks only for the correct, legal and not unreasonable or inequitable construction of the law, in its position that this employee of a mining company, who was not employed in or about a mine or a smelter, or upon machinery or under conditions declared hazardous in construction work, is not within the Arizona Employers' Liability Law. And especially not when an accident occurs that is not remotely caused by an inherent hazard or due to a condition or conditions of employment in any hazardous occupation in mining, smelting and the like. This is not a case where sympathy for physical injury enters. Many are the cases calling for sympathy and in which the injured has no legal remedy or seeks none. In this case the common law remedy was open to the

plaintiff, if his facts could support an action thereunder. This case rather, it seems to the defendant, calls for that statesmanlike construction which is peculiarly to be expected of the Federal Courts, and to be based upon the Constitution and Laws of Arizona and the decisions especially of this court and of the supreme court of the United States and the evident purpose and intent as shown in the opinions thereof. The question thus raised is whether this Constitution and the Law, taken in connection with the decisions and opinions of the said Courts upon this Law, contemplate that an employee whose work is pick and shovel and other miscellaneous work around on the grounds of an employer who at times conducts or intends to conduct in some buildings on said ground smelting or other operations declared hazardous, but to hazards of which the employee is not subjected, is in a hazardous occupation; whether an accident occurring while such an employee is doing a piece of small construction work, such work not reaching that magnitude which would bring it within the specific provisions of the law relating to and declaring construction to be hazardous under certain conditions, Sec. 3156 (5), is due to a condition or conditions of, and an inherent risk in, any employment in mining, smelting or other occupations having inherent risks and conditions as provided by the Constitution and declaratory Law. Manifestly this employee engaged upon the work

he was employed regularly to do and which he was doing at the time of injury, was no more subjected to inherent risks, conditions or hazards of any occupation in mining, smelting or machinery, deemed hazardous under the Constitution and Law, than an employee engaged to do similar pick and shovel work around the grounds and buildings of a school or university. If the Court were to take the attitude, which we urge cannot be taken in this case under its own decision and a fair construction of the Law, that work not "in and about" a smelter may be construed or found to be incidental to smelting and to come within smelting, it is submitted that this particular work could not be so regarded as incidental, but has the same relation as work of constructing a railroad to the smelter, work building hotels and houses for employees, manual work in the hotels, (and in fact mining itself, because mining is necessary before any smelting can be done); all of which are manifestly outside mining and smelting and operation as contemplated by the Employers' Liability Law.

Such a construction would also defeat the limitations stated in the decision in the Hammer case, which clearly shows the determination of the Supreme Court that recovery is only for accidents attributable to "hazards inherent in" and "due to its inherent conditions." The opinion of this Court in the *New Cornelia v. Espinoza* case, where it quotes with approval the *Mathews* case and denied a pe-

tition for rehearing based upon an opinion in the Egich case, shows also that this Court considers the unique and distinctive clauses of the Arizona Law to be an inherent part of that law and are not to be brushed aside as surplusage; especially in view of the unlimited liability permitted by that Law and of the five to four decision in the Hammer case, where these unique portions were considered and given effect.

We quote as follows from the Hammer case, 63 L. Ed. 1058:

“In effect the statute requires the employer, instead of the employee, to assume the pecuniary risk of injury or death of the employee **attributable to hazards inherent in the employment** and due to its conditions. (p. 1067) * * *

“We are unable to say that the Employers’ Liability Law of Arizona, in requiring the employer in hazardous industries to assume—so far as pecuniary consequences go—the entire risk of injury to the employee attributable to accidents arising in the course of the employment, and **due to its inherent conditions**, exceeds the bounds of permissible legislation, or interferes with the constitutional rights of the employer (p. 1067) * * *

“To the suggestion that the act now or hereafter may be extended by construction to **nonhazardous occupations**, it may be replied: first, that the occupations in which these actions arose were indisput-

ably hazardous, hence plaintiffs in error have no standing to raise the question; and secondly, it hardly is necessary to add that employers in non-hazardous industries are in little danger from the act, **since it imposes liability only for accidental injuries attributable to the inherent dangers of the occupation.**" (p. 1070).

We respectfully urge that the assurance that there is no danger of the act being extended by construction to nonhazardous occupations because it imposes liability only for accidental injuries attributable to the **inherent dangers** of the occupation, will be totally defeated and overruled if, as in this case, a jury upon uncontradicted and admitted facts can be permitted to become the final judges of the law and its construction and to thus as a finding of fact extend the statute to accidents in an occupation of an employee which is essentially nonhazardous and which accidents are not attributable to inherent dangers or conditions of or "in and about" occupations in mining, machinery in plants, and the like, as such occupations are contemplated by the Constitution of Arizona. What meaning or force could that statement in the Hammer case have, if each jury may find, on admitted facts, as a fact or a matter of law whether or not **any** accident in an alleged hazardous occupation occurs in a hazardous occupation and is due to an **inherent danger**, or is to be the unregulated judge of whether the facts, when admitted, constitute an ac-

cident in a hazardous occupation and due to inherent dangers; or if "inherent" is in effect disregarded.

Also, if the contention of plaintiff were true that the Arizona Supreme Court in the Egich case has discarded its former position as stated in the Mathews case, namely, that it is essential an accident be due to inherent dangers and to conditions of the employment in hazardous occupations, then it would appear the Court has withdrawn one of the bases or props upon which the Supreme Court of the United States by the narrow decision declared the Arizona Employment Liability Law constitutional in the Hammer case, thereby re-opening that question. We therefore do not believe the Egich case should be construed as contended for, but if it is so construed it attempts to overrule the United States Supreme Court and could have no effect upon this Court so far as the case at bar is concerned.

In consideration of the questions presented it must be borne in mind that there is no other enactment which contains the unique and distinctive conditions of the Arizona Law and especially that the injury (Sec. 3154, R. S. A) "must be due to a **condition or conditions of such (hazardous) occupation,**" in addition to the type form enactments providing for accidents "arising out of or in the course **of the employment or occupation.**" This, the Su-

preme Court of Arizona in the Mathews case and this Court in the New Cornelia case, clearly recognize.

This defendant therefore respectfully submits, as set forth in its Motion in Arrest of Judgment and Assignment 20, that under the Constitution of Arizona and of the United States, and decisions of the Arizona Supreme Court, of this Court, and of the U. S. Supreme Court, this judgment deprives the defendant of property without due process of law, and it should be reversed.

Havens & Baker

Attorneys for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

McDONALD-WEIST LOGGING COMPANY, a
Corporation,

Appellant,

vs.

E. L. COBB, as Trustee in Bankruptcy of the CRAIG
LUMBER COMPANY, a Corporation, Bank-
rupt,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Alaska, Division No. 1.

FILED

JUL 30 1921

F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

McDONALD-WEIST LOGGING COMPANY, a
Corporation,

Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

RODEN & DAWES, Juneau, Alaska,

Attorneys for Appellant.

JOHN H. COBB, Esq., Juneau, Alaska,

Attorney for Appellee.

In the District Court for the District of Alaska,
Div. No. One, at Juneau.

Claim No. 31.

IN BANKRUPTCY.—No.—.

In the Matter of the CRAIG LUMBER COM-
PANY, a Corporation, Bankrupt.

Claim of MacDonald-Wiest Logging Company.

United States of America,

Territory of Alaska,

Division No. One,—ss.

At Juneau, in said District of Alaska, Division No. One, on May 22d, 1919, came L. J. McDonald, of Ketchikan, Alaska, in said Division and District, and made oath and says: That the said Craig Lumber Company, a corporation, the corporation for whom a petition for adjudication of bankruptcy has been filed, was at and before the filing of the said petition and still is justly and truly indebted to the said MacDonald-Wiest Lumber Company, a corporation, in the sum of \$27,871.50, with interest thereon, from December 20th, 1918, at 8% per annum amounting in all

2 *McDonald-Wiest Logging Company*

to \$28,328.90; that the consideration of said debt is as follows:

“For logs sold and delivered to the said Craig Lumber Company, a bankrupt, during the period from January 1st, 1918, to December 20th, 1918.”

And that no part of said debt has been paid and that there are no offsets nor counterclaims to the same; that said debt was due on December 20th, 1918, and is still due, and that no note has been received for such account nor any judgment rendered thereon, and that said McDonald-Wiest Lumber Company has not, nor has any person by its order or to its knowledge or belief for its use had or received any manner of security for said debt whatever, except that said company claims and holds a lien on logs and lumber as more particularly set out in the hereto attached copy of complaint, and that this deponent is the treasurer of the said McDonald-Wiest Lumber Company, and is duly authorized by said corporation [1*] to make this affidavit and proof for the said corporation and in its behalf.

L. J. MacDONALD.

Subscribed and sworn to before me this May 22d, 1919.

[Notarial Seal]

H. L. FAULKNER,

Notary Public for Alaska.

My commission expires Nov. 14, 1922. [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

In the United States District Court for Alaska,
Division Number One, at Juneau.

IN BANKRUPTCY—No. 31.

In the Matter of the CRAIG LUMBER COM-
PANY, a Corporation, Bankrupt.

**Objections of Trustee to Claim and Lien of the Mac-
Donald-Wiest Lumber Co., a Corporation.**

Now comes E. L. Cobb, trustee of the estate of the above-named Craig Lumber Company, bankrupt, and objects to the proof of claim filed by the MacDonald-Wiest Lumber Company, a corporation, of the State of Washington, and prays that the same may not be allowed on the following grounds to wit:

1. Said claim is not a claim provable in bankruptcy, for the reason that the said MacDonald-Wiest Lumber Company is a foreign corporation; that it never complied with the laws of Alaska concerning foreign corporations doing business in Alaska, and at no time, and is not now authorized to do business in Alaska; that the said claim is founded upon and grows out of a contract for cutting logs in Alaska, which is the business of said company, which said contract was, and is, illegal and void.

2. Said MacDonald-Wiest Lumber Company falsely asserts and alleges the consideration and amount of its claim in this: Said claim alleges the consideration to be "For logs sold and delivered to the said Craig Lumber Company, a bank-

rupt, during the period from January 1st, 1918 to December 20th, 1918."

That in truth and in fact the consideration for said claim was a contract made by and between the said bankrupt and said claimant in the year 1917, whereby the claimant undertook to cut, put in the water and boom logs belonging to the Craig Lumber Company and situated in Alaska at the rate of Ten (\$10.00) Dollars per M. B. M.

That said contract was illegal and void for the reasons [3] set out in the first paragraph hereof, but if the same had been legal, there was not, and is not due thereon, the sum of \$28,328.90 for that, the statement, "that no part of said debt has been paid," is untrue; that in part, the Craig Lumber Company, bankrupt, paid upon said contract, the sum of \$12,660.30, and there was not due on said contract (if the same had been legal) to exceed the sum of \$19,527.30.

3 The claim of a lien upon logs and lumber belonging to the bankrupt estate made by the said MacDonald-Wiest Lumber Company, a corporation, to secure said claim is void, because (1) the said company is a foreign corporation, and had not at the time it was engaging in the business out of which said claim grew and at the time it attempted to fix its alleged lien by filing its claim of lien, complied with the laws of Alaska, so as to be legally authorized and empowered to do business in Alaska. (2) The claim of lien filed by the said MacDonald-Wiest Lumber Company is false and fraudulent in this: the said

claim alleges that under its said contract with the Craig Lumber Company, bankrupt, it had cut, felled and boomed 3,762,310 feet B. M. of logs, and had only been paid the sum of \$9,748.50, while in truth and in fact the said MacDonald-Wiest Lumber Company had under its said contract cut, felled and boomed not to exceed 3,218,760 feet B. M., and had been paid the sum of \$12,660.30. That no claim of lien for the amount due under said contract (if the same had been legal) was ever filed by the said MacDonald-Wiest Lumber Company.

4. The said MacDonald-Wiest Lumber Company is a corporation, and during the year 1918, and prior thereto was engaged in the business of contracting on a large scale for the getting out and delivery of logs from the forests to lumber-mills, which contracts it carried out and performed by the employment of large forces of laborers, but itself did no labor whatsoever, and is not "a person" to whom a lien is given on logs within the purview and meaning of the [4] statutes of Alaska (Compiled Laws, section No. 709) providing for liens upon logs.

5. The claimed lien upon 2,000,000 feet of lumber at the mill of the Craig Lumber Company, bankrupt, is void, for the reasons aforesaid, and for the further reason, that said notice of lien fails to show that the MacDonald-Wiest Lumber Company performed any labor or rendered any service in the manufacture of said lumber, and in truth and in fact said company did not perform

any labor or render any service in the manufacture of said lumber.

WHEREFORE the trustee prays that the said claim of the MacDonald-Wiest Lumber Company be disallowed and expunged, and for such other orders as to the Court may seem proper.

J. H. COBB,
Attorney for the Trustee.

United States of America,
Territory of Alaska,—ss.

E. L. Cobb, being first duly sworn, on oath, deposes and says: I am the trustee above named. The above and foregoing objections are true to the best of my knowledge and belief.

E. L. COBB.

Subscribed and sworn to before me this 2d day of August, 1919.

[Notarial Seal]

J. H. COBB,
Notary Public in and for Alaska.

My commission expires June 8, 1923.

Service of the above and foregoing objections of the trustee admitted this the 2d day of August, 1919.

_____,
Attorney for the MacDonald-Wiest Lumber Company.

Filed in the District Court, District of Alaska,
First Division. Feb. 13, 1920. J. W. Bell, Clerk.
By _____, Deputy.

Filed August 2, 1920. H. B. Le Fevre, Referee in Bankruptcy, First Division of Alaska, Box 613 Juneau, Alaska. [5]

In the United States District Court for the District of Alaska, Division Number One, at Juneau.

IN BANKRUPTCY—No. 31.

In the Matter of CRAIG LUMBER COMPANY,
a Corporation, Bankrupt.

E. L. COBB, Trustee,

Petitioner,

vs.

McDONALD-WIEST LOGGING COMPANY,
Respondent.

JOHN H. COBB, Esq., for Petitioner.

JOHN RUSTGARD, Esq., for Respondent.

Decision of Referee.

This controversy arose upon the petition of the trustee objecting to the allowance of the claim of the McDonald-Wiest Logging Company, as a lien claim, upon the grounds:

1. That the respondent was without right or recourse to prosecute his cause for the reason that it was a corporation and had not complied with such requirements of the laws of Alaska as would permit it to maintain actions in the courts, and upon other grounds hereinafter set forth. The referee having decided against the respondent upon the first grounds, respondent appealed and upon

such appeal the Judge reversed the referee, whereupon the petitioner appealed to the Circuit Court of Appeals where the decision of the Judge was sustained and the controversy was again brought before the referee for his decision upon the other questions of law involved in the controversy as follows:

1. That respondent is a corporation and as such has no right of lien.

2. That natural persons comprising the corporation have no right of lien.

3. That some of the logs being converted into lumber the lien does not follow into the lumber.

[6]

4. That the liened logs were mixed with other logs and that there being no way to designate which lumber came from such logs so liened and, therefore, to such extent, the lien is lost.

I.

The McDonald-Wiest Lumber Company is and during all the time herein mentioned was a corporation duly organized and existing as such under and pursuant to the laws of the State of Washington; that said corporation had paid its license fee required by the laws of Alaska for the years 1918, 1919 and 1920, in due time; that the following documents, but none others, were filed by the said corporation in the office of the Secretary of the Territory of Alaska, to wit:

1. Certified copy of articles of incorporation, filed January 28, 1918.

2. Appointment and consent of L. J. McDonald as resident agent, filed January 28, 1918.

3. Financial statement signed by G. B. McDonald as acting President and as Secretary, but not sworn to nor attested by a majority of the directors, filed February 16, 1918.

4. Financial statement sworn to by J. B. McDonald as President and Secretary, but not attested by a majority of the directors, filed February 27, 1919.

That the following documents were filed by said corporation in the office of the clerk of the Court for the First Division, at Juneau, Alaska, to wit:

1. Certified copy of articles of incorporation, filed December 12, 1917.

2. Appointment of L. J. McDonald as resident agent, filed December 12, 1917.

The consent of the agent attached to the resolution appointing the agent above referred to reads as follows:

“I, L. J. MacDonald, a resident of the First Judicial Division of the Territory of Alaska, residing at Craig in said Division, having been appointed resident agent for the McDonald-Wiest L. Co., a foreign corporation, hereby accept said appointment for all purposes set forth in the foregoing certificate.

Dated at Craig, Alaska, this 20th day of November, 1917.

_____” [7]

That the name “L. J. MacDonald,” the word “First,” immediately prior to the words “Judi-

cial Division," and the name "MacDonald-Wiest L. Co.," and the name "Craig" are all written with pen and are in the handwriting of L. J. MacDonald, the remainder of the certificate being printed.

3. Annual report, filed February 11, 1919, sworn to by the President but not attested by the directors.

II.

That the Craig Lumber Company, a corporation, the bankrupt above named, during all the time herein mentioned was organized and existing as a corporation under and by virtue of the laws of the State of Washington, and had complied with the laws of the Territory of Alaska authorizing foreign corporations to do business in said Territory.

III.

That on or about the 2d day of January, 1918, at Wrangell, Alaska, the MacDonald-Wiest Lumber Company entered into verbal contract with the Craig Lumber Company whereby the former was to cut and boom logs for the Craig Lumber Company from a timber tract on Long Island in the First Division of Alaska, said tract being on the United States Forest Reserve and having been purchased by the Craig Lumber Company from the United States Government. The MacDonald-Wiest Lumber Company agreed to cut and boom the logs from said timber tract and make the same ready for towage for the price of ten dollars per thousand feet board measure, the Craig Lumber Company to do the towing, and the said Craig

Lumber Company agreed to pay the MacDonald-Wiest Lumber Company the sum of ten dollars for every thousand feet of logs cut and boomed by it from the said tract. The Craig Lumber Company agreed to pay all stumpage charges, do all its own towing at its own risk, tow all the scows, floats, float-houses and general logging equipment of the MacDonald-Wiest Lumber Company from Wrangell, Alaska, to Howkan, Alaska, [8] the place where the logs were to be cut, free of charge; to return all boomsticks to the MacDonald-Wiest Lumber Company at Howkan, or, if the Craig Lumber Company kept and used any boomsticks, to pay for the same at the rate of ten dollars per thousand feet, board measure; to furnish all necessary boom chains, free of cost, and to make payment for each raft as soon as the same was completed and taken in tow by the Craig Lumber Company's tug.

The MacDonald-Wiest Lumber Company, under this contract, during the year 1918 cut, rafted and delivered to the Craig Lumber Company 3,376,300 feet of logs, and under said contract cut but did not raft or deliver 350,000 feet board measure of logs, the said last amount of logs being at the spar-tree on the tract in question and ready for rafting at the time the MacDonald-Wiest Lumber Company was ordered by the bankrupt to discontinue cutting under the contract. The logs delivered by the MacDonald-Wiest Lumber Company to the bankrupt during the year 1918 were towed by the Craig Lumber Company from the Mac-

12 *McDonald-Wiest Logging Company*

Donald-Wiest Lumber Company's camp near Howkan, Alaska, to the Craig Lumber Company's mill at Craig, Alaska, and sawed into lumber by the Craig Lumber Company, except that some of said logs, amounting to some 250,000 feet, were in the log-pound at said Craig Lumber Company's mill at Craig, Alaska, unsawed, at the time the said Company became bankrupt. Under and pursuant to the contract above mentioned, the MacDonald-Wiest Lumber Company cut for and delivered to the Craig Lumber Company the following rafts, on the dates below given, to wit: [9]

1918				
June	1.	Raft No. 1	342,780 feet	\$3,427.80
"	1.	Raft No. 2	264,000 "	2,640.00
July	6.	Raft No. 3	302,000 "	3,020.00
"	31.	Raft No. 4	420,010 "	4,200.10
Aug.	1.	Raft No. 5	291,120 "	2,911.20
"	1.	Raft No. 6	287,310 "	2,873.10
Sept.	30.	Raft No. 7	297,870 "	2,978.70
Oct.	10.	Raft No. 8	269,260 "	2,692.60
"	10.	Raft No. 9	330,860 "	3,308.60
"		Raft No. 10	288,960 "	2,889.60
Nov.	22.	Raft No. 11	282,130 "	2,821.30
		Boomsticks	53,126 "	531.26
		"	350,000 "	3,500.00
3,779,426 ft. @ \$10				\$37,794.26

The operations of claimant under said contract commenced in the month of April, 1918. The two first rafts mentioned in the above list were delivered prior to the first day of July, 1918. The third raft above mentioned was delivered on the 6th day of July, 1918, and the fourth raft above named was delivered on the 31st day of July,

1918. The logs in the fourth raft above mentioned were all cut during the month of July, 1918, and the logs in all the other rafts were cut and delivered subsequent to the first day of July, 1918. All the logs delivered subsequent to August, 1918, were cut after the first of August, 1918.

That on the 20th day of December, 1918, the Craig Lumber Company directed the MacDonald-Wiest Lumber Company to discontinue cutting logs under the aforementioned contract and to discontinue their operations. That at that time claimant had logs at the spar-tree on the tract in question amounting to 300,000 feet; that the same were ready to be made into rafts, and that the actual cost of booming the said logs would be not to exceed one dollar per thousand feet board measure, that at the time the said operations were so discontinued the Craig Lumber Company had paid to the MacDonald-Wiest Lumber Company under said contract the sum of \$10,544.57; and no more, and that no more has been paid on said account since; that said sum had been paid in installments by way of bank checks or freight advances or by merchandise, and so credited by the MacDonald-Wiest Lumber Company upon the first deliveries made, each payment credited being applied upon the oldest claim against the bankrupt; and that at the time the Craig Lumber [10] Company was adjudged bankrupt there was due and owing claimant upon said account above set out the sum of \$27,871.50. That on the 30th day of December, 1918, and within six months after

all the work had been done in cutting said logs for which said indebtedness had been incurred, claimant filed its lien, duly verified, in the office of the Recorder of Ketchikan Recording Precinct, within which said logs and the lumber sawed therefrom were located and situated, and within which the work had been done, which lien was filed pursuant to the provisions of sections 709 to 715, inclusive, of the Compiled Laws of Alaska, a copy of which lien statement so filed is hereto attached and made a part of this statement of facts.

That during all the time herein mentioned the sole stockholders of the MacDonald-Wiest Lumber Company were J. B. MacDonald, L. J. MacDonald, Allan MacDonald and C. P. MacDonald, all brothers. During the year 1918 the officers of the said corporation were J. B. MacDonald, President and Secretary, and L. J. MacDonald, Treasurer. That all of the said stockholders performed manual labor in the cutting and booming of the aforementioned logs. G. B. MacDonald helped to fall timber, assisted in booming or rafting, kept the books and cut the wood for the cook-house. L. J. MacDonald, Treasurer, performed the duty of timber-faller, at times was engineer in charge of the donkey-engine used in getting the logs into the water, and assisted in booming up and other work. Allan MacDonald, stockholder, worked as hook-tender and at times helped to fall timber and also did the blacksmith work. C. P. MacDonald worked as engineer on the other donkey, performed the duty of high climber and rigging the spar-tree

(high lead) and generally assisted in the actual work of cutting and booming said logs. All the said MacDonalds, during the year 1918, averaged not less than twelve hours a day during seven days a week, of the very hardest labor in the actual work of cutting said logs for the Craig Lumber Company from [11] about the first day of March, 1918, to the 20th day of December, 1918.

That during the season when the logs were being cut, the said MacDonalds had an average of four men to assist them, some of the time they had none, some of the time they had two other men and at times they had as many as six or eight, but the average would be four men in addition to themselves.

That the logs in question, with the exception of those left at the spar-tree and one raft of 350,000 feet ready for delivery at Howkan, were towed to the Craig Lumber Company's sawmill at Craig and there placed in the log-pound of the mill, ready for sawing into lumber. All of said logs, except a raft of about 300,000 feet in the log-pound at the mill, were sawed at the said bankrupt's mill and piled in the lumber-yard of said bankrupt company at Craig. The remainder was left in the log-pound at the time the sawmill operations closed and were taken over by the trustee in bankruptcy, as was also the lumber in the yard. Of all the logs received or sawed by the bankrupt company at the said mill, eighty per cent consisted of the logs above mentioned and cut by claimant, the MacDonald-Wiest Lumber Company. The other

twenty per cent received by or cut by the bankrupt were furnished by others not interested in the MacDonald-Wiest Lumber Company. That the lumber cut from the said logs furnished by the MacDonald-Wiest Lumber Company was in the lumber-yard, mixed with lumber cut from the logs furnished by other parties, at the time of bankruptcy. That some three million feet, more or less, as the inventory of the trustee may show, of the lumber cut from said logs was in the lumber-yard of the bankrupt at the time the trustee was appointed. That the MacDonald-Wiest Lumber Company claims a lien upon the said logs and the lumber cut therefrom and remaining in the mill-pound at Craig or in the form of rafts at Howkan or in the form of lumber in the mill-yard above mentioned, and claims the prior right to have the funds received by the trustee from the sale of said logs and lumber applied upon the [12] claim above named of the MacDonald-Wiest Lumber Company.

COPY

MacDONALD-WIEST LUMBER CO.,
Claimant,

vs.

CRAIG LUMBER CO., a Corporation,
Defendant.

LABORER'S LIEN, AMENDED.

NOTICE IS HEREBY GIVEN, That the MacDonald-Wiest Lumber Company, a corporation organized under the laws of the State of Wash-

ington and doing business in Alaska, claims a lien upon the following logs, lumber and personalty and improvements, to wit:

One certain raft of logs situated in the Mission Cove, Long Island, Howkan, South-eastern Alaska, consisting of 300,000 feet, more or less, in a boom; together with 300,000 feet of loose logs piled at a spar-tree close to Howkan, Alaska; together with 275,000 feet of logs in a pocket boom situated above the mill in the vicinity of Craig, Alaska, said logs were all cut and felled from standing timber at and near Howkan, Alaska, by said claimant between March 1, 1918, and December 20, 1918, consisting of spruce and hemlock;

Together with 2,000,000 feet of lumber, of all dimensions principally rough, with some dimension lumber, all of which remains and now is situated in the yard of said defendant where the same was manufactured, together with the dock, one cook-house and four bunk-houses, all in said yard, and all of said lumber and buildings and improvements having been manufactured out of 3,112,310 feet of logs, cut and felled by said claimant and furnished to said defendant under the contract herein set forth.

Said claimant claims a lien upon all aforesaid logs, lumber and improvements for labor performed upon and assistance rendered in obtaining, securing, cutting and manufacturing said logs and lumber at the instance of said owner.

That the name of the owner, or reputed owner, of said logs and lumber is the Craig Lumber Company, a corporation, organized under the laws of the State of Washington and doing business in Alaska; that said Craig Lumber Company employed said MacDonald-Wiest Lumber Company to perform such labor and render such assistance upon the following terms and conditions: Defendant purchased the standing timber from which said logs were cut, and employed claimant to cut and fall and boom the same at Howkan, Alaska, at an agreed compensation of \$10.00 per thousand B. M., payable when boomed at Howkan, Alaska, defendant to take said logs at said point ready for delivery to its tow-boat: that claimant cut, felled and boomed 3,762,310 b. d. ft. of logs under said contract, and has faithfully performed and fully complied with said contract on its part, and claimant performed labor and assisted in cutting, falling and manufacturing said logs and lumber for a period beginning March 1, 1918, and ending December 20, 1918, and thirty days have not elapsed since that time; that the amount of said claimant's demand for such services is \$37,620.00; that no part thereof has been paid, except \$9,748.50, and there is now due and remaining unpaid thereon, after deducting all just credits and offsets, the sum of \$27,871.50, in which amount claimant claims a lien upon said property.

MacDONALD-WIEST LUMBER COMPANY,
By L. J. MacDONALD,
Manager. [13]

United States of America,
Territory of Alaska,—ss.

L. J. MacDonald, being first duly sworn, on his oath says: That he is the treasurer and manager of the above MacDonald-Wiest Lumber Company, and by resolution duly authorized to file and sign the foregoing claim, that he has read the same, knows the contents thereof, and believes the same to be true.

L. J. MacDONALD.

Subscribed and sworn to before me this 30th day of December, 1918,

CHAS. E. INGERSOLL,
Notary Public for Alaska.

My commission expires Oct. 5, 1922.

No. 107.

This certifies that the within instrument was filed for record on the 31 day of Dec., 1918, at 2 o'clock P. M. in vol. 2 of Liens, at page 10 of the records of said office at Ketchikan, Alaska.

WM. T. MAHONEY,
Recorder.

United States of America,
Ketchikan Precinct No. 8,
Div. No. 1, Alaska,—ss.

I, Henry C. Story, U. S. Commissioner for the Ketchikan Precinct No. 8, Div. No. 1, Alaska, and Recorder for the Ketchikan Recording District No. 8, Alaska, do hereby certify that the attached Laborer's Lien Amended, filed by MacDonald-Wiest Lumber Company, Claimant, vs. Craig Lumber Co.,

a Corporation, Defendant, is a full, true, and correct copy of the original of the same, and the whole thereof, as it appears of record in the records of the Ketchikan Recording Office in my office in Volume 2 of Liens at page 10, filed for record and recorded on the 31st day of December, 1918, at 2 o'clock P. M.

In testimony whereof I have hereunto set my hand and the official seal of my office on this 9th day of March, 1919.

HENRY C. STORY,

U. S. Commissioner for Ketchikan Precinct No. 8,
and Recorder for said Precinct, Alaska.

Filed September 27, 1919. H. B. Le Fevre,
Referee in Bankruptcy, First Division in Alaska,
Box 613, Juneau, Alaska.

This decision is based upon the foregoing facts proven at the hearing before the referee on December 20, 1920:

From which statement of facts the referee concludes and decides: [14]

1. It does not seem reasonable that either a corporation or a contracting firm could be designated a laborer (defined in *Shultz vs. Shively*, 143 P. 1115, and in *Day vs. Green*, 127 P. 772) under the meaning of the section. The principal of a laboring proxy under the Alaska labor lien law is precluded from all the rights of the lienor for the right of lien is not assignable, though the lien, when perfected by the actual laborer, may be. An artificial person can have labor performed but cannot labor. The doctrine is very plainly stated in

R. C. L., V. 17, P. 1118, Par. 43. Sec. 709, C. L. A., is adopted from the Oregon Code and its text is quoted *verbatim* by the Supreme Court of Oregon in its decisions. In none of the Oregon cases traceable through the Pacific Digest has the Court in any way intimated that corporations and contracting firms are laborers within the scope of the section which explains: "The cook in a logging camp and any and all others who may assist in or about a logging camp shall be regarded as a person who assists in obtaining or securing the saw-logs * * * "

2. Contractors, even though they labor individually, have no right of lien. Ibid.

3. The lien attaches to the material of the logs even after it has been converted into lumber.

4. Confusing the output from the logs does not destroy the lien which attaches to the logs after they are converted into lumber, that is to say, the lumber, especially when the lumber, or the money derived from its sale, is still in the hands of the party who contracted for the labor.

Upon that respondent is a corporation and a contractor, its claim as a lien claim is disallowed.

December 29, 1920.

H. B. LE FEVRE,

Referee in Bankruptcy, First Division of Alaska,
Box 613 Juneau, Alaska. [15]

In the United States District Court for the District of Alaska, Division Number One, at Juneau.

IN BANKRUPTCY.—No. 31.

In the Matter of CRAIG LUMBER COMPANY,
a Corporation, Bankrupt.

E. L. COBB, Trustee,

Petitioner,

vs.

McDONALD-WIEST LOGGING COMPANY,
Respondent.

JOHN H. COBB, Esq.

JOHN RUSTGARD, Esq.

Order of Referee.

At Juneau, December 30th, 1920.

This cause came on for hearing before the referee upon the appearance of the attorneys for the parties on the 20th day of December, 1920, John H. Cobb, Esq., appearing for the petitioner and John Rustgard, Esq., appearing for the respondent. Whereupon John Rustgard, Esq., on behalf of the respondent, submitted record evidence and respondents statement of facts. Whereupon the hearing was continued for the day and on the 21st day of December, 1920, John H. Cobb, Esq., filed a statement of facts on behalf of the petitioners, and the parties having submitted their respective arguments, citations and briefs, and it appearing from the records and files of this court that the referee has regained

jurisdiction of the controversy, limited to the questions at issue that have not been decided, and having rendered and entered his decision, in [16] which all matters and things at issue are fully set out; that all necessary notice has been given to establish said claim as a general claim, effective and of full force and virtue from the date of its filing; that all the issues in controversy are of law and no issues upon the facts have been raised, the Court thereby adopts the findings in the referee's decision herein; and all matters and things being heard, understood and considered, it is

ORDERED, That the claim of the McDonald-Wiest Logging Company Numbered 31, for \$28,328.90, with interest amounting to \$457.40, be and hereby is disallowed as a lien claim, an it is

ORDERED, That the status of said claim be and hereby is established as a general claim with all rights and benefits attaching and of full force and virtue at and from the date of its filing, and it is

ORDERED, That, upon the McDonald-Wiest Logging Company, respondent, consenting to the status of said claim as a general claim, the trustee do pay said respondent, the McDonald-Wiest Logging Company, from the moneys of the estate in his hands, twelve per cent of the amount of said claim and of the interest thereon due, and that said claim do fully participate in all dividends herein-after paid to the general creditors.

H. B. LE FEVRE,

Referee in Bankruptcy, First Division of Alaska,
Box 613 Juneau, Alaska. [17]

In the District Court of the United States for the
Territory of Alaska, Number One, at Juneau.

IN BANKRUPTCY.—No. 31.

In the Matter of the CRAIG LUMBER COMPANY,
a Corporation, Bankrupt.

MacDONALD-WIEST LOGGING COMPANY,
Claimant.

Petition for Review.

Comes now the above-named claimant, the Mac-Donald-Wiest Logging Company, a corporation, by its attorney, John Rustgard, and complains that that certain order and decision rendered and entered December 30, 1920, is unjust, and alleges that the referee erred

(1) In holding that this claimant has or had no right of lien upon that certain raft or boom of logs located at Howkan, Alaska, and cut and boomed by this claimant.

(2) In holding that this claimant had no right of lien upon those certain logs or any portion thereof located and being in the mill-pound at Craig, Alaska, and cut and boomed by this claimant.

(3) In holding that this claimant had no right of lien upon the lumber in the mill-yard at Craig, Alaska, cut from logs cut and boomed by this claimant.

(4) In holding that this claimant has no right of lien upon or prior right to the moneys received by the trustee for the sale of the said boom of logs at Howkan, the said logs in the said mill-pound at Craig,

or of the said lumber or any portion thereof situated in the mill-yard at Craig, Alaska.

And this claimant desires a review by the Judge of the District Court for Division Number One, Territory of Alaska, of the aforementioned order and decision made by the referee, [18] H. B. Le Fevre, and petitions for such review and also petitions that the referee forthwith certify to the said Judge the questions presented, together with a full and correct statement of the evidence relating thereto, and the findings and order of the referee thereon.

Dated at Juneau, Alaska, this 31st day of December, 1920.

THE MacDONALD-WIEST LOGGING
COMPANY, Claimant,
By JOHN RUSTGARD,
Attorney.

Filed December 31, 1920. H. B. Le Fevre, Referee in Bankruptcy, First Division of Alaska, Box 613 Juneau, Alaska. [19]

In the District Court of the United States for the
District of Alaska, Division Number One, at
Juneau.

IN BANKRUPTCY.—No. 31.

In the Matter of CRAIG LUMBER COMPANY,
a Corporation, Bankrupt.

E. L. COBB, Trustee,

Petitioner,

vs.

McDONALD-WIEST LOGGING COMPANY,
Respondent.

JOHN H. COBB, Esq., for Petitioner.

JOHN RUSTGARD, for Respondent.

Certificate of Referee to Judge.

I, H. B. Le Fevre, one of the referees of said court in bankruptcy, do hereby certify that in the course of the proceedings in said cause before me the questions arose that are shown in my decision of the controversy with a summary of the evidence relating thereto and the findings and order of the referee thereon.

And the said questions are certified to the Judge for his opinion thereon.

Dated at Juneau the 31st day of December, A. D. 1920.

H. B. LE FEVRE,

Referee in Bankruptcy, First Division of Alaska,
Box 613 Juneau, Alaska.

Filed in the District Court, District of Alaska,
First Division. Dec. 31, 1920. J. W. Bell, Clerk.
By V. F. Pugh, Deputy. [20]

In the District Court for the District of Alaska,
Division No. One, at Juneau.

No. 2057-A.

In the Matter of the CRAIG LUMBER COMPANY,
a Corporation, Bankrupt.

E. L. COBB, Trustee,

Petitioner,

vs.

McDONALD-WIEST LOGGING COMPANY,
Respondent.

Memorandum Opinion.

Delivered ———, 1921.

J. H. COBB, for Petitioner.

RODEN and DAWES, for Respondent.

JENNINGS, Judge:

The McDonald-Wiest Logging Company is a corporation organized under the laws of the State of Washington. It made an abortive effort to comply with the laws of the Territory of Alaska requiring corporations to file certain papers before doing business in the said territory. The Craig Lumber Company was also a foreign corporation, and duly complied with the requirements of the laws of said terri-

tory concerning the doing of business within the said territory.

On the 2d day of January, 1918, these corporations entered into a contract whereby the former was to cut logs for the latter. The logs to be cut belonged to the Government. The McDonald-Wiest Company was to cut and raft the logs; the Craig Lumber Company was to pay the Government stumpage, and to do all the work of towing the logs to their mill situated at Craig. [21]

Under this contract the McDonald-Wiest Company cut and rafted 3,779,426 feet of logs on the dates hereinafter mentioned and of the money value set opposite the respective dates, to wit:

1918

June 1st	\$6067.80
July 6th	3020.00
July 31st	4200.10
August 1st	5784.30
September 30th	2978.70
October 10th	8890.80
November 22d	6852.56

Total value.....\$37794.26

On December 20, 1918, the Craig Lumber Company directed the McDonald-Wiest Company to discontinue cutting logs under the aforementioned contract. At that time the McDonald-Wiest Company had in the woods 300,000 feet of logs already cut, but not rafted, under the contract. The Craig Lumber Company made certain payments from time to time, and on the said 20th day of December, 1918,

its total payments had amounted to the sum of \$10,544.57; since said date it has made no payments.

On the 19th day of March, 1920, the Craig Lumber Company was adjudged to be a bankrupt. A trustee was duly elected on May 28, 1919. The McDonald-Wiest Company duly filed with the trustee a claim for \$27,871.50, alleging that amount to be due under said contract, maintaining that it has a preferred claim for that amount on the proceeds of the sale of logs and the lumber manufactured therefrom (said proceeds now being in the hands of the trustee), by reason of a lien notice which it had theretofore filed.

The trustee objected to the claim upon two ground,—1st that as the McDonald-Wiest Company had not complied with the requirements of the statute it was not authorized to do business in Alaska and any contract made by it was void and could not be enforced in the bankruptcy court; 2d, that even if it had power to enforce its claim in the bankruptcy court, still its lien had no standing in court on account of the fact, as alleged, that the statute gives a lien only to persons performing labor upon logs and not to contractors cutting logs. [22]

The referee decided, 1st, that the fact that claimant was a foreign corporation which had not complied with said statute did not preclude it from asserting its lien or filing its claim in bankruptcy; 2d, that the statute of Alaska gives a lien only to laborers and not to contractors, and that as the claimant was a contractor and not a laborer it follows as a matter of law that the said claimant had no lien.

The referee allowed the claim but refused to make it a preferred claim.

Both sides appealed from the decision of the referee.

The matters certified to the Court are as follows: Did the referee commit error in holding (1) that the McDonald-Wiest Company had standing in court to prosecute this claim; (2) that the said company did not have a preferred claim?

As to the first question, the trustee calls the attention of the Court to section 660 of the Compiled Laws of Alaska, 1913, which provides:

“That if any foreign corporation or company fails to comply with the provisions of this chapter (chapter 23) all its contracts with citizens of the District shall be void as to the corporation or company, and no court of the District or of the United States shall enforce the same in favor of the corporation or company so failing.”

It is difficult, however, to see how this section at all affects the matter in controversy, for the reason that the Craig Lumber Company is not a citizen of the District. It is itself a foreign corporation, and therefore a provision of law that no Court shall enforce the same (meaning thereby contracts with citizens of the District) does not apply.

Our statute relating to foreign corporations doing business in the District of Alaska does not make void the contracts of corporations which do business without complying with the statutory requirements, except such contracts as are made with citizens of

Alaska. The contracts of a noncomplying corporation with others than citizens of Alaska is voidable at the election of the other [23] party. The statute also prescribes a penalty for noncomplying corporations doing business, to wit: they shall forfeit the sum of \$25.00 per day. (See section 657.)

The effect of such a provision is not to make contracts void.

5 Thompson on Corporations, sec. 6708.

Two foreign corporations may do business with each other within the District of Alaska without filing any articles, appointing any agents, or taking any other steps, and just so long as they deal with each other only, their contracts are voidable, not void. In such case they would incur the danger of the Attorney-General bringing a suit to recover \$25.00 per day for every day either of them shall so neglect to file the papers required by the statute. It is only when a foreign corporation which has failed to comply with the statutory requirements deals with a citizen of the District that the contracts are void, and the Court is enjoined not to enforce the same in favor of the corporation or company which so fails.

“Voidable at the election of the other party thereto” means, in this case, “voidable at the election of the Craig Lumber Company.” The question, therefore, is, has the Craig Lumber Company ever elected to avoid the contract in question? It is apparent, I think, that so far from electing to avoid the contract in question, the Craig Lumber Company has emphatically elected to stand by the

contract. It has received benefits from the contract and has paid more than \$10,000.00 in various sums on account from time to time, but now, after the contract has been in force for more than twelve months, the trustee, who was only appointed on May 28, 1919, assumes to make an election. I do not think he has the power to do so. The Craig Lumber Company itself already having made an election is bound by the same. It can make but one election—it cannot elect to accept the logs and pay for part of them and not pay for the remainder. If the bankrupt could not make a further election, how can the trustee?

As to the first point, therefore, the decision of the referee is upheld. [24]

As to the second point, to wit, whether or not the claim of the McDonald-Wiest Company should be considered as a preferred claim: Our logger's lien statute is in derogation of the common law and must be strictly construed in so far as it attempts to create a lien in favor of persons not in possession of the personal property upon which labor is performed. It is true that being a remedial statute it must be liberally construed so far as to affect the purpose and intent of the legislature. The purpose and intent of the legislature must be gathered from the terms of the act, and it seems to me that the provision creating liens upon logs was intended to benefit persons who performed labor upon logs. I cannot see anything in the statute which even squints at the idea that contractors who perform no manual labor on or about the

logs shall have a lien therefor. The lien is given to the person who does the work so that the fruits of his labor may not be lost by a sale by the party for whom the labor is done. Under said statute any employee of the McDonald-Wiest Company would have a lien upon the logs, if his claim was duly filed, but how the McDonald-Wiest Logging Company would have a lien upon the logs is not apparent, for it has performed no labor, although some of its stockholders may have done so.

I am cited to the following cases:

Kronback Lumber Co. vs. Williams Bros., 75 S. W. 854 (Ark.), but it seems that that case is an authority against the party who cites it, for the Court there says:

“As to contractors, we have several times held that a contractor is not a laborer within the meaning of the statute giving persons liens who performed work and labor, the statute being intended to protect the actual laborer, and does not apply to contractors or those who only superintended the labor of others.”

It is true that the Court in that case said that the Williams Brothers, the contractors, would have a lien for the *work actually performed* by them, but it also said that “as the evidence does not show the value of this work, we are unable to enter a final decree here.” [25]

Allen vs. Roper, 86 S. W., page 836, does not touch the question here under consideration.

Martin vs. Wakefield, 43 N. W. 966, simply holds that manual labor includes the use of the implements or instrumentalities actually used in and necessary to the performance of such labor, such, for instance, as a team, the Court saying:

“A man and his team are employed on the work at a gross price for both. The fact that the employer may *them work* separately the whole or a part of the time can make no difference.”

Breault vs. Archambault, 67 N. W. 346, simply holds that a blacksmith employed at the camp in shoeing horses and repairing sleds and in mendingg and keeping in order the tools used by the men actually engaged in the common enterprise is also entitled to a lien.

Carver vs. Bagley, 81 N. W. 757, is in favor of the claimant, but the decision is a mere *ipse dixit*. No authorities of any kind are cited, the statute is not given, and as an authority the case is not of a very compelling character.

To the contrary, see 17 R. C. L., sec. 43.

In the cases of Day vs. Green, 127 P. R. 772, and of Schultz vs. Shively, 143 P. R. 1115, cited in support of the lien, the point in question here was not suggested.

The decision of the referee on this point is also upheld.

Filed in the District Court, District of Alaska, First Division. May 9, 1921. J. W. Bell, Clerk. By V. F. Pugh, Deputy. [26]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

IN BANKRUPTCY—No. 31.

No. 2057-A.

In the Matter of the CRAIG LUMBER CO., a Corporation, Bankrupt.

E. L. COBB, Trustee,

Petitioner,

vs.

McDONALD-WIEST LOGGING CO.,

Respondent.

Order Affirming Decree of Referee.

This cause came on duly to be heard before the District Court for Alaska, Honorable Robert W. Jennings presiding, at Juneau, on the 9th day of May, 1921, upon an Appeal by the McDonald-Wiest Logging Co., a corporation, claimant, from an order and decree of H. B. Le Fevre, Referee in Bankruptcy, allowing the claim of the said McDonald-Wiest Logging Co. for \$27,871.50, with interest thereon from December 20, 1918, at eight per cent per annum, as a general claim, but refusing to allow the same as a secured claim upon the proceeds of certain logs and lumber in the hands of the trustee; and upon the appeal by the trustee from the said order and decree of the referee refusing to expunge said claim from the list of claims against the bankrupt; Messrs. Roden & Dawes appearing for the McDonald-Wiest Logging Co., and

Mr. J. H. Cobb appearing for the trustee; and the court having heard the arguments of counsel and duly considered the same,

IT IS CONSIDERED AND ADJUDGED by the Court that the aforementioned order and decree of H. B. Le Fevre, as Referee in Bankruptcy, be and the same is hereby affirmed, and the cause [27] remanded to Referee in Bankruptcy for further proceedings.

DONE IN OPEN COURT, at Juneau, Alaska, this the 14th day of May, A. D. 1921.

ROBERT W. JENNINGS,
Judge.

O. K.—RODEN & DAWES.

Entered Court Journal No. Q, page 278.

Filed in the District Court, District of Alaska, First Division. May 14, 1921. J. W. Bell, Clerk. By L. E. Spray, Deputy. [28]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

IN BANKRUPTCY—No. 31.

No. 2057-A.

In the Matter of the CRAIG LUMBER COMPANY, a Corporation, Bankrupt.

E. L. COBB, Trustee,

Petitioner,

vs.

MacDONALD-WIEST LOGGING CO.,
Respondent.

Assignment of Errors.

Comes now the MacDonald-Wiest Logging Company, a corporation, by its attorneys, and presents this, its assignment of errors, and herein specifically points out the errors on which it relies on this appeal, to wit:

I.

That the Court erred in holding that the claimant, MacDonald-Wiest Logging Company, a corporation, had no right of lien under section 709, Compiled Laws of Alaska, for the price of logs furnished the bankrupt under a contract to cut and raft logs at a stipulated price per thousand feet.

II.

That the Court erred in making and rendering its judgment and decree affirming the order of the Referee in Bankruptcy disallowing the claim of the MacDonald-Wiest Logging Company, a corporation, as a preferred claim upon proceeds from the sale of logs and lumber in the hands of the trustee.

And for these errors and others manifest of record the respondent herein prays for a reversal of the said Judgment and Decree, and that a decree be entered in favor of claimant and respondent and for such other and further relief as may seem meet and proper.

RODEN & DAWES,
Attorneys for Respondent.

Copy received and service admitted this 21 day of May, 1921.

J. H. COBB,
Attorney for Petitioner.

Filed in the District Court, District of Alaska,
First Division. May 24, 1921. J. W. Bell, Clerk.
By —————, Deputy. [29]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

IN BANKRUPTCY—No. 31.

No. 2057-A.

In the Matter of the CRAIG LUMBER COM-
PANY, a Corporation, Bankrupt,

E. L. COBB, Trustee,

Petitioner,

vs.

MacDONALD-WIEST LOGGING COMPANY,
Respondent.

**Petition for Allowance of Appeal and Order Allow-
ing Same.**

Comes now the MacDonald-Wiest Logging Com-
pany, a corporation, respondent in the above-en-
titled matter and cause, by its attorneys, and
considering itself aggrieved by the order, judgment
and decree of the District Court rendered herein on
the 14th day of May, 1921, affirming the order of
the Referee in Bankruptcy disallowing the claim of

the MacDonald-Weist Logging Company, a corporation, as a preferred lien claim upon proceeds from the sale of logs and lumber in the hands of the trustee, and having filed its Assignment of Errors herein, respectfully prays the Court to allow an appeal from said decree to the Honorable United States Circuit Court of Appeals for the Ninth Circuit.

RODEN & DAWES,
Attorneys for Respondent.

ORDER.

Upon consideration of the above and foregoing petition for the allowance of appeal, it is ORDERED that the appeal prayed for be, and the same is hereby, allowed.

Done in open court, this 24th day of May, 1921.

ROBERT W. JENNINGS,
District Judge.

Copy received and service admitted this 21 day of May, 1921.

J. H. COBB,
Attorney for Trustee.

Entered Court Journal No. D, pages 53, 54.

Filed in the District Court, District of Alaska, First Division. May 24, 1921. J. W. Bell, Clerk.
By —————, Deputy. [30]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

IN BANKRUPTCY—No. 31.

No. 2057—A.

In the Matter of the CRAIG LUMBER COM-
PANY, a Corporation, Bankrupt.

E. L. COBB, Trustee,

Petitioner,

vs.

MacDONALD-WIEST LOGGING COMPANY,
a Corporation,

Respondent.

Citation on Appeal.

The President of the United States of America,
to E. L. Cobb, Trustee, Petitioner, and to J.
H. Cobb, His Attorney, GREETING:

You and each of you are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an order allowing appeal to said court from a decree in a cause lately pending in the District Court for the Territory of Alaska, Division Number One, at Juneau, in the above-entitled and numbered cause, then and there to show cause, if any there be, why the decree mentioned in the said order should not be corrected and speedy justice done to the parties in that behalf.

WITNESS the Honorable Chief Justice of the United States Supreme Court, this 24th day of May, 1921.

ROBERT W. JENNINGS,
District Judge.

Copy received and service admitted this — day of May, 1921.

_____,
Attorney for Petitioner.

Filed in the District Court, District of Alaska, First Division. May 24, 1921. J. W. Bell, Clerk.
By _____, Deputy. [31]

In the District Court for the Territory of Alaska,
Division Number One, at Ketchikan.

IN BANKRUPTCY—No. 31.

No. 2057-A.

In the Matter of the CRAIG LUMBER CO., a Corporation, Bankrupt.

E. L. COBB, Trustee,

Petitioner,

vs.

MacDONALD-WIEST LOGGING CO., a Corporation,

Respondent.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, the MacDonald-Wiest Logging Company, a corporation, as principal, and M. J. Heneghan

and J. E. Anderson, as sureties, are held and firmly bound unto E. L. Cobb, trustee in bankruptcy for the above-named bankrupt, in the penal sum of \$250.00, to the payment of which well and truly to be made we hereby bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that whereas the above-named respondent, the MacDonald-Wiest Logging Company, a corporation, has appealed from a judgment rendered in the above-entitled court and cause on the 14th day of May, 1921, to the United States Circuit Court of Appeals for the Ninth Circuit, for a reversal of said judgment and decree;

NOW, THEREFORE, if the above-named MacDonald-Wiest Logging Company, a corporation, as appellant, shall prosecute said appeal to effect and if it fails to make good its plea, shall answer all costs and damages adjudged against it, then this obligation shall be null and void; otherwise to remain in full force and effect.

Witness our hands and seals this 24th of May, 1921.

MacDONALD-WIEST LOGGING COMPANY,

(Seal)

By L. J. MacDONALD,

J. E. ANDERSON, (Seal)

Surety.

M. J. HENEGHAN, (Seal)

Surety.

United States of America,
Territory of Alaska,—ss.

M. J. Heneghan and J. E. Anderson, each being first duly sworn, on oath, deposes and says: That I am a resident of the District of Alaska; that I am not a counsellor or attorney at law; that I am not a marshal, deputy marshal, commissioner, clerk of any court, or other officer of any court; that I am worth the sum of \$500.00 over and above all my debts and liabilities, exclusive of property exempt from execution.

J. E. ANDERSON.

M. J. HENEGHAN.

Subscribed and sworn to before me this 24th of May, 1921.

[Notary Seal]

A. H. ZEIGLER,

Notary Public for Alaska.

Approved.

ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska, First Division. May 24, 1921. J. W. Bell, Clerk.
By ———, Deputy. [32]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

IN BANKRUPTCY—No. 31.

No. 2057-A.

In the Matter of the CRAIG LUMBER COM-
PANY, a Corporation, Bankrupt.

E. L. COBB, Trustee,

Petitioner,

vs.

THE MacDONALD-WIEST LOGGING CO., a
Corporation,

Respondent.

Waiver of Service.

The above-named E. L. Cobb, Trustee, petitioner, by his attorney, hereby waives service of the following papers to be filed by the MacDonald-Wiest Logging Company, a corporation, respondent, in the above-entitled and numbered cause, in its appeal from the order and decree made and entered herein on the 14th day of May, 1921, to wit: Petition for allowance of appeal, assignment of errors, bond on appeal and citation on appeal; provided, that true copies thereof shall be served upon the undersigned attorney for said trustee within a reasonable time after the filing of same for the dispatch of mail from Ketchikan to Juneau, Alaska.

J. H. COBB,
Attorney for Trustee.

Filed in the District Court, District of Alaska,
First Division. May 24, 1921. J. W. Bell, Clerk.
By L. E. Spray, Deputy. [33]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau.

IN BANKRUPTCY—No. 31.

No. 2057-A.

In the Matter of the CRAIG LUMBER COM-
PANY, a Corporation, Bankrupt.

E. L. COBB, Trustee,

Petitioner,

vs.

MacDONALD-WIEST LOGGING CO., a Cor-
poration,

Respondent.

Praeceptum for Transcript of Record.

To J. W. Bell, Clerk:

You will please make up a transcript, in accordance with the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, and of this Court, of the record in the above-entitled cause, and include therein the following papers, to wit:

1. Claim of MacDonald-Wiest Logging Co.
2. Objections of the Trustee to the Claim and Lien of the MacDonald-Wiest Logging Co., a Corporation.
3. Decision of Referee.
4. Order of Referee.

5. Petition for Review.
6. Certificate of Referee to Judge.
7. Memorandum Opinion.
8. Order Affirming Decree of Referee.
9. Assignment of Errors.
10. Petition for Allowance of Appeal—Order Allowing Same.
11. Citation on Appeal.
12. Bond on Appeal.
13. Waiver of Service,
14. This Praecipe.

RODEN & DAWES,
Attorneys for Respondents.

Filed in the District Court, District of Alaska,
First Division. Jun. 7, 1921. J. W. Bell, Clerk.
By L. E. Spray, Deputy. [34]

In the District Court for the District of Alaska,
Division No. 1, at Juneau.

**Certificate of Clerk U. S. District Court to Trans-
script of Record.**

United States of America,
District of Alaska,
Division No. 1,—ss.

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached thirty-four pages of typewritten matter, numbered from one to 34, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record

prepared in accordance with the praecipe of attorneys for respondent and appellant on file in my office and made a part hereof, in Cause No. 31—In Bankruptcy—2057-A, wherein MacDonald-Wiest Logging Company, a corporation, is respondent and appellant, and E. L. Cobb, trustee for the Craig Lumber Company, a corporation, bankrupt, is petitioner and appellee.

I further certify, that the said record is by virtue of the petition on appeal and citation issued in this cause and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to sixteen and 35/100 dollars (\$16.35), has been paid to me by counsel for appellants.

In witness whereof I have hereunto set my hand and the seal of the above-entitled court this 10th day of June, 1921.

[Seal]

J. W. BELL,
Clerk.

By L. E. Spray,
Deputy.

[Endorsed]: No. 3704. United States Circuit Court of Appeals for the Ninth Circuit. McDonald-Weist Logging Company, a Corporation, Appellant, vs. E. L. Cobb, as Trustee in Bankruptcy of the Craig Lumber Company, a Corporation, Bankrupt, Appellee. Transcript of Record.

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filed June 20, 1921.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

McDONALD-WEIST LOGGING COMPANY, a
Corporation,

Appellant,

VS.

E. L. COBB, as Trustee in Bankruptcy of the
CRAIG LUMBER COMPANY, a Corpora-
tion, Bankrupt,

Appellee.

Brief of Appellant

Upon Appeal from the United States District Court
for the District of Alaska, Division No. 1.

RODEN & DAWES,
Attorneys for Appellant.

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tion, Bankrupt,

Appellee.

BRIEF OF APPELLANT

STATEMENT OF THE CASE.

This is an appeal from an order of the District Court for the District of Alaska, Division Number One, at Juneau, upholding the decision of a Referee in Bankruptcy allowing the claim of appellant, MacDonald-Weist Logging Company, a corporation, as a general claim against the bankrupt estate of the Craig Lumber Company, a corporation, bankrupt, and denying the same as a preferred claim by virtue of a lien notice duly filed by appellant.

The Craig Lumber Company, a corporation, (hereinafter called the Lumber Company) was organized and existing under and by virtue of the laws of the State of Washington and was, during the year 1918, engaged in the business of operating a sawmill at Craig, Alaska.

The MacDonald-Weist Logging Company, a corporation, (hereinafter called the Logging Company) all the capital stock of which was owned by four brothers who were its officers and directors, was also a Washington corporation and was engaged in the Territory of Alaska in the business for which it was organized.

On the 2nd day of January, 1918, these companies entered into a contract whereby the Logging Company agreed to cut and raft logs for the Lumber Company at \$10.00 per thousand feet. The timber was upon the public domain and the Lumber Company agreed to pay the stumpage, tow the logs to its mill and pay the Logging Company, for its services in cutting and rafting, the stipulated price. Under the contract the Logging Company cut, rafted and delivered 3,779,426 feet of logs, which service, under the contract, was of the value of \$37,794.26. On the 20th day of December, 1918, the Lumber Company directed the Logging Company to discontinue cutting under the contract. At that time the Lumber Company had paid to the Logging Company \$10,544.57 and there was one raft

of 350,000 feet ready for delivery and 300,000 feet of logs cut and ready for rafting. (Rec. pp. 10-16.)

On March 19th, the Lumber Company was adjudged a bankrupt. The Logging Company, thereafter, duly filed its claim for \$27,871.50 due on the contract, (Rec. p. 13) claiming a preference to that amount by virtue of a lien notice duly filed pursuant to law. (Rec. pp. 13-14.)

The Trustee in Bankruptcy objected to the allowance of the claim alleging that the contract was not enforceable in a Bankruptcy Court and also objected to the preference claimed under the lien alleging that the Logging Company, being a corporation and an artificial person, was not within the law granting a lien to persons performing labor upon or who shall assist in obtaining or securing logs. The first objection has been decided in favor of the appellant herein and is the subject of another appeal by the Trustee and will not be further noticed herein.

The Referee in Bankruptcy found for the Trustee upon the question of the validity of the lien and was upheld by the District Court, which ruling and the judgment entered thereon the appellant assigns as error. (Rec. p. 37.)

ARGUMENT.

Section 709, Compiled Laws of Alaska, under which the lien is claimed, reads as follows:

"Sec. 709. Every person performing labor upon, or who shall assist in obtaining or securing, saw logs, spars, piles, or other timber shall have a lien upon the same for the work or labor done upon or in obtaining or securing the same, whether such work or labor was done at the instance of the owner of the same or his agent. The cook in a logging camp and any and all others who may assist in or about a logging camp shall be regarded as a person who assists in obtaining or securing the saw logs, spars, piles, or other timber mentioned herein."

It is the conclusion of the Referee that it is not reasonable that either a corporation or a contractor can be "designated a laborer" under the meaning of Section 709, C. L. A. He further concludes that "Contractors, even though they labor individually, have no right of lien." (Rec. pp. 20-21.)

The District Court "cannot see anything in the statute which even squints at the idea that contractors who perform no manual labor on or about the logs shall have a lien therefor." (Rec. pp. 32-33.)

Both the District Court and the Referee base their ruling upon the authority of 17 R. C. L. 1118. This text, upon the subject "Scope of Statutes; Laborers and Contrators," is based upon the statement that:

"It is commonly provided by such statutes that persons laboring in connection with cutting, hauling, or drawing wood, logs or lumber shall have a lien for *personal services, or manual labor*, and it is therefore important in as-

certaining the scope of such a statute to determine what constitutes laboring.”

The author then defines a “laborer” as:

“One who labors, with his physical powers, in the service and under the direction of another, for fixed wages.”

We must urge that there is no necessity of bringing appellant within the above definition of a “laborer” since the Alaska statute does not contain the restrictive words *manual labor or personal services* and for the same reason the language from Ruling Case Law does not apply to the present case unless it be the part which reads as follows:

“In some jurisdictions the statutes have been interpreted so as to permit of the filing of a lien by a contractor for the services rendered by his servants and agents, regardless of whether the lienor has performed any manual labor himself, and in others the privilege of the lien is extended to labor performed by the lienor himself or others working in his employ.”

Is a Corporation a “Person” Within the Loggers’ Lien Law?

This appeal, as it appears to us, presents two questions of law as follows: 1.—Is a corporation, organized for the purpose of logging, a “Person” within the provisions of Sec. 709 C. L. A.? 2.—Has a contractor a right of lien for the contract price of logs furnished?

Upon the first question we will state that the rule is general that the word “person” in a statute includes a corporation.

"Since a corporation is for corporate purposes a legal entity and an ideal person in the law, it is regarded as a "person" * * within the meaning of contract and statutory or constitutional provisions, if it is within the reason and purpose of such provisions and is not expressly or impliedly excluded from their operation; and sometimes this rule is expressly declared by statute. This is true of foreign as well as domestic corporations, if the statute may properly apply to them." 14 C. J. 64.

"*Person.* Ordinarily the word *person* includes corporation." 2 Lewis's Sutherland Statutory Construction (2nd Ed.) 770.

The citations of authorities upon the point under *Persons* (subtitle Private Corporations) in Words and Phrases, cover pages.

Particularly as to the laws creating liens of mechanics, and laborers, Corpus Juris continues:

"So unless expressly or impliedly excluded, a corporation, is a "person", * * etc., within the meaning of statutes relating * * to liens of mechanics, material men, machinists, etc;".

A leading case upon this point is *Wetzel & T. Ry. Co. v. Tennis Bros.* (C. C. A.) 145 Fed. 458. In that case the Court held that the words "or other person" in a statute giving a lien to "every workman, laborer or other person" included a corporation. The opinion reads, in part:

"At common law, a corporation is deemed a "person" when the circumstances in which it is placed are identical with those of a natural person, which, irrespective of the statute, and

the construction placed thereon by the court under the circumstances of this case, would include such a claim as the one sought to be enforced here. It is true that in this case, the claim is in behalf of a corporation; but it is for work of an individual character, as distinguished from corporate service;”.

Citing: *Gaskell v. Beard*, 11 N. Y. S. 399.

Loudon v. Coleman, 59 Ga. 653.

Doane v. Clinton, 2 Utah, 417.

The last above cited, and *Fagan v. Boyle Ice Machine Co.*, 65 Tex. 374, are cases from states having statutory provisions that the word “person” includes a corporation.

In *Gaskell v. Beard*, the New York case cited above, the court said:

“It will be seen that it (the statute) has not provided, by the most critical implication, that the person or persons to be protected shall be natural persons, but the provision is that any person or persons furnishing the material or performing the labor or service shall be entitled to the lien; and a corporation is a person within the meaning of this language.”

In the Compiled Laws of Alaska there is no general provision to the effect that the word “person” includes corporations. It is specifically so provided, however, in the section called the Criminal Code (as adopted from Oregon) and in two special Acts of Congress relative to Transportation and Fisheries in Alaska. Oregon has since (1901) enacted such a general law in addition to the pro-

vision in the Criminal Code as adopted by Alaska. Upon the whole, there is much more reason to conclude that Section 709 should be construed to include corporations than there is to conclude that it should not. Section 706 provides a lien for "any person who is a common carrier * * and any person who shall safely keep or store grain, wares, merchandise and other personal property." There is no more indication in this section that the word "person" is intended to exclude corporations than there is in Section 709, and yet we do not think that the District Court would advance the idea that only a natural person is entitled to the lien provided for the common carrier and warehouseman. At the present time "hand loggers" furnish only a small percentage of the logs delivered to the lumbering mills and since corporations may properly be organized for the purpose of getting out logs, there seems to us to be no reason for denying them the protection of the law.

Has a Contractor a Right of Lien for the Contract Price of Logs Furnished?

This is purely a question of statutory construction. The precise point seems not to have been passed upon by the Courts of Alaska or Oregon. The point is well stated and some very clear illustrations are suggested by Jones on Liens.

"Liens for services or manual labor depend on statutes.—

“Whether this (Loggers’) lien be merely for the personal services or manual labor of the claimant, as is the case under the statutes of Maine and Vermont, or includes services performed by his servants and teams, as is the case under the statutes of New Hampshire and of Wisconsin, depends much upon the terms of the statute, though statutes substantially in the same terms have received diverse interpretations in different states. In the latter state the Supreme Court has declared that the words ‘labor and services’ in a statute giving a lien should be construed as broadly as their common use will allow; and without other restrictive words this language would include labor and services performed by servants and agents, as well as personally, just as, in the common count in assumpsit for work and labor done, recovery may be had for work and labor not personally and manually performed by the plaintiff.” (Hogan v. Cushing, 49 Wis., 169, 5 N. W. 490.) *Jones on Liens, Sec. 720.*

Let us examine the wording of the statutes of Maine and New Hampshire which have been construed respectively to deny and give the contractor a lien for services of servants and agents.

MAINE.—“Whoever labors at cutting, hauling, rafting, or driving logs or lumber * * has a lien on the logs and lumber for the amount due for his *personal services* and for the services performed by his team,”

“Whoever both shores and runs logs by *himself, his servants or agents*, has a lien thereon for the price of such shoring and running;”

It will be seen that the statute specifically provides for personal services in one section and for

services by servants or agents in the other according to the kind of work being done. Could the Maine court, though inclined to construe lien statutes liberally, change the result if a contractor sought to enforce a lien for cutting, hauling or rafting if the service was not performed personally or by team?

And in New Hampshire the statute as plainly provides a lien for services performed by agent or servant.

NEW HAMPSHIRE. "A person who, *by himself or others*, or by teams, shall perform labor or furnish supplies to the amount of fifteen dollars or more towards rafting, driving, cutting, hauling, sawing, * * shall have a lien thereon."

It is such statutes as Section 709 C. L. A. that the Courts are called upon to construe and then we see what Jones means where he states, in the paragraph quoted above, "the same terms have received diverse interpretations in the different states." His illustrations of this point are the decisions of the courts of Vermont and Wisconsin, the former having denied the lien to contractors while by the latter it is allowed. The word "wages" may have been the reason for the ruling in Vermont. The statutes are as follows:

VERMONT.—"A person cutting or drawing logs, acting under a contract with the owner thereof, shall have a lien thereon for his *wages*."

WISCONSIN.—"Any person who shall do or perform any labor or services in cutting,

hauling, * * * any logs, * * shall have a lien upon such material."

The Trend of the Decisions.

The trend of the decisions in the matter of loggers liens on the point in question is very plainly shown by the authorities of the State of Washington *where the law is almost identical with Section 709, C L. A.*

Sec. 1679, Gen. Stat. Wash.—“Every person performing labor upon, or who shall assist in obtaining or securing, saw logs, spars, piles, or other timber has a lien upon the same for the work or labor done upon or in obtaining or securing the same, whether such work or labor was done at the instance of the owner of the same or his agent. The cook in a logging-camp shall be regarded as a person who assists in obtaining or securing the timber herein mentioned.”

The early cases in Washington held that a contractor who did not perform labor personally could not have a lien. The first indication of a more liberal construction is in 1895 when the Court held, against the objection that the claim was partly for labor furnished as distinguished from labor performed:

“This court has held that one cannot enforce a lien for the labor of hired men, but we think that the testimony in this case shows, in the case of Hopkins, that it was substantially for furnishing and for his own labor, and it is reasonably shown by the proof that the labor performed and the materials furn-

ished were worth the amount claimed." *Hopkins v. Jamieson-Dixon Mill Co.*, 39 Pac. 815.

In 1901, the Washington Court, after commenting on the earlier strict construction in that State, said:

"In addition to the fact that the court of later years has been inclined to construe the lien laws more liberally in favor of lienors, in this case the lienor, Martin, had a contract for hauling all these shingles, and in no event could the labor employed change the contract price or change the relations between the employer and the lienor, and the case falls within the rule announced by this court in *Hopkins v. Jamieson-Dixon Mill Co.*, where was sustained a lien that was partly for labor furnished as distinguished from labor performed." *Blumauer v. Clock*, 64 Pac. 844.

And in *O'Conner v. Burnham*, 95 Pac. 1013, (Wash.) *where the agreement was that the respondents should furnish men and teams and place the logs in the river at \$4.00 per 1,000 feet board measure, it was held that claimants had the right of lien.*

While we have found no Oregon case in point, an indication of the liberal construction which might be expected from that State is found in the recent case of *Wessenfels v. Schaffer*, 195 Pac. 362, where the Oregon Court says:

"The labor of plaintiff's team in hauling the cordwood was an integral part of the services in obtaining the wood. The statute does not contemplate that logs or cordwood shall be

secured or handled altogether by hand. * * A reference to the cases arising under the statutes of other states, which differ in language from ours, is of but little avail."

And the Court cites Hogan v. Cushing, 5 N. W. 490, which holds that the words "labor and services" in a statute, without other restrictive words, should be construed to include labor and services performed by servants and agents.

It seems to us that the statute does not in any way indicate that the "person" to be protected shall be a natural person and, therefore, by settled authority its protection is extended to a corporation; That such intended protection is not defeated by the fact that the claim of lien is based upon the contract price of the services rendered and includes services of claimants servants. As in the Washington case cited above, "in no event could the labor employed change the contract price or change the relations between the employer and the lienor." Any other line of reasoning does not parallel the course of justice and we ask that this Honorable Court reverse the Judgment of the District Court to the end that appellant may be protected.

Respectfully submitted,

RODEN & DAWES,

Attorneys for Appellant.

United States Circuit Court of Appeals

For The Ninth Circuit

McDONALD-WEIST LOGGING COMPANY, a Corporation,

Appellant,

vs.

E. L. COBB, as TRUSTEE IN BANKRUPTCY of the
CRAIG LUMBER COMPANY, a Corporation,
BANKRUPT,

Appellee.

E. L. COBB, as TRUSTEE IN BANKRUPTCY of the
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BANKRUPT,

Appellant,

vs.

McDONALD-WEIST LOGGING COMPANY, a Corporation,

Appellee.

BRIEF OF McDONALD-WEIST LOGGING COMPANY

Upon Appeal from the United States District
Court for the District of Alaska, Division No. 1

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Attorney for E. L. Cobb, Trustee.

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F. D. MONCKTON,

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BRIEF OF McDONALD-WEIST LOGGING COMPANY

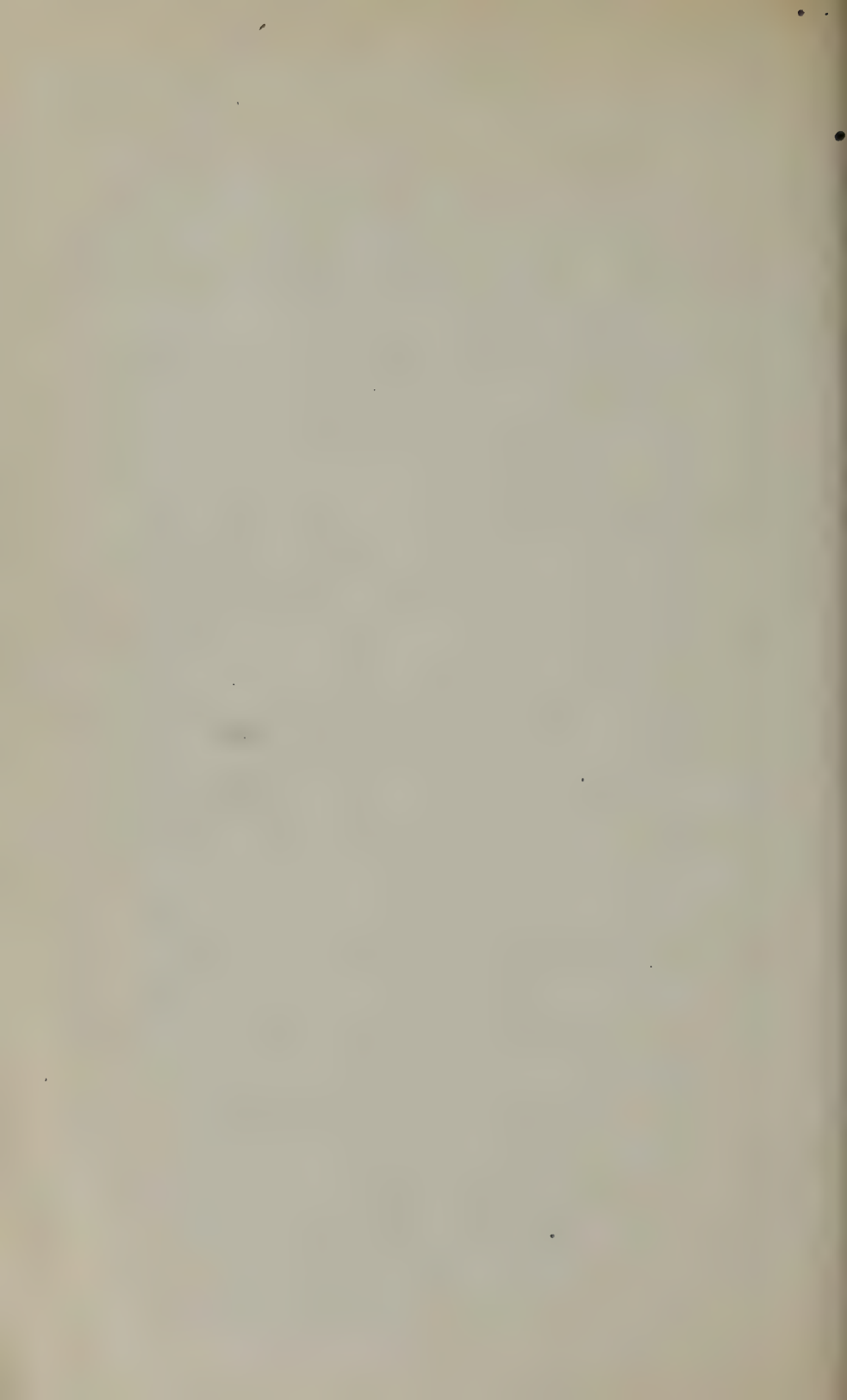
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BRIEF OF McDONALD-WEIST LOGGING COMPANY

Upon Appeal from the United States District
Court for the District of Alaska, Division No. 1

STATEMENT OF THE CASE

The two cases numbered 3699 and 3704 in this court arise upon an appeal by E. L. Cobb as Trustee in Bankruptcy of the Craig Lumber Company, a corporation, bankrupt, from an order allowing a claim of McDonald-Weist Logging Company, a corporation, against said bankrupt as an unsecured claim, which appeal

is known as No. 3699, and an appeal of the McDonald-Weist Logging Company from that part of the same order which denied its assertion of a preferred claim securing the amount found to be due it. Consequently the two appeals in reality constitute but one proceeding and may be treated together in this Court. The proceedings arose in the bankruptcy side of the District Court for the District of Alaska, Division No. 1, at Juneau.

The McDonald-Weist Logging Company and Craig Lumber Company are both Washington corporations. For convenience hereinafter the Craig Lumber Company will be called the lumber company and the McDonald-Weist Logging Company will be called the logging company. The lumber company was engaged in operating a sawmill at Craig, Alaska, and it had arranged with the United States forestry officials for the purchase on stumpage basis of timber from a tract of federal forest reserve on Long Island in the Division of Alaska.

The logging company was a corporation formed and solely owned by four brothers, G. B. McDonald, L. J. McDonald, Allen McDonald and C. P. McDonald. These men were all practical loggers and the corporation was no more than a convenient means of keeping track of their logging business which was confined to work in which they actively and physically participated and which was under their immediate control. On the 2nd of January, 1918, these brothers, in the name of the logging company,

took a job with the lumber company cutting logs from the said forest reserve and delivering them in rafts in the water at Howkan, Alaska, at the rate of \$10 per thousand feet. The understanding in which this job was taken was not in writing and the outstanding feature of it was that the lumber company was to pay the logging company for its work in cutting logs at the rate of \$10 per thousand feet. It was also to pay at the same rate for any boom sticks it failed to return to Howkan.

The logging company, through its officers and without the aid of counsel, undertook to fill out the necessary blanks to qualify to do business under the laws of Alaska and filed certain papers, as more fully appears in the records here. No effort will be made in this brief to detail these papers or the circumstances of their filing, as it is the contention and theory of the logging company that the questions relative to the sufficiency of the action taken by the logging company in seeking to qualify to do business in Alaska, are all *res judicata*. This contention is based on the fact that heretofore, in this same bankruptcy proceeding, the referee in bankruptcy at Juneau held, on the petition of the trustee in bankruptcy, that the attempt at compliance made by the logging company was abortive and that it was not qualified to do business under the laws of Alaska and that therefore the agreement was void and the claim should be expunged. An appeal was taken from this decision of the referee to the District Court at Juneau, which

reversed the referee's holding, and the trustee petitioned this court for a review of that ruling and that petition was denied by this Court. The decision of the District Court upon that angle of the case therefore became final long prior to the decree appealed from and is not open now to question. All these facts appear from the record.

In the month of April, 1918, these four brothers, together with as many as six to eight hired men, an average of about four men in addition to themselves, began the cutting of logs under the oral hiring aforesaid, and between that time and the 20th day of December, 1918, they cut and rafted 3,779,426 feet of logs, which, at the rate agreed upon, earned them the sum of \$37,794.26. A detailed statement of the time of the cutting of various rafts of logs appears in the opinion of the referee forming a part of the record on both of these appeals, and without detailing the time the logs were cut and the state of the account, it is sufficient to say that on the 20th day of December, 1918, a balance was due the logging company on account of the cutting of logs of \$28,871.50, and that this accrued on account of work done within a period of less than six months prior to the 30th day of December, 1918. In the cutting of the logs in question all of the four brothers aforesaid worked not less than twelve hours per day, seven days per week, at the very hardest manual labor during the time covered by the claim.

All of these facts are set forth in the opinion of the referee aforesaid and both parties have adopted that opinion without objection or exception and the case was tried upon the facts therein appearing in the District Court and may be tried in the same way here. It is, therefore, unnecessary to state the facts more in detail than has been done, inasmuch as that opinion is concise. It appears at page 7 of the Transcript in the appeal No. 3704.

On the 30th day of December, 1918, the logging company filed a claim of lien under the laws of the Territory of Alaska covering such of the logs as had not yet been cut into lumber and also upon two million feet of lumber remaining in the yard of the lumber company at Craig, Alaska, which had been cut from logs furnished under this contract, with certain exceptions which appear in the memorandum opinion of Judge Jennings. Judge Jennings' opinion appears at page 27 of the Transcript in case No. 3704. This lien notice was filed in conformity with the laws of the Territory of Alaska regulating loggers' liens.

Although there had been some logs furnished to the lumber company by others than the logging company, these other persons had been fully paid for their logs or their claims had been otherwise disposed of, so that there was no conflict as to priority between the logging company and any other lien claimant. The issue was squarely framed, upon the facts appearing in the opinions of the referee and of

the District Judge, as to whether the logging company had a right of lien to secure its claim and whether by reason of its failure to comply with the laws of Alaska in the matter of filing the necessary documents, it was barred from collecting the money due it.

POINTS AND AUTHORITIES

I.

The decision of the District Court upon the question of the right of the logging company to collect the money due for its work and upon the validity of the agreement covering the work having become final after the petition to review in this Court failed, that question is no longer open for trial here. It was decided adversely to the trustee and he must abide that decision.

In re Craig Lumber Co., 266 Fed. 692.

II.

Neither the lumber company nor the logging company having been citizens of Alaska, the contract between them was voidable only, and not void, even if the compliance of the logging company with the statute was incomplete. The lumber company having accepted the benefits of the contract and not having elected to avoid it, the trustee has now no right to make an election to treat the contract as invalid.

Section 660, Compiled Laws of Alaska,
1913.

V. Thompson on Corporations, Section
6708.

III.

Although the efforts of the logging company to comply with the laws of Alaska may have been misdirected, they were sufficient to constitute a substantial compliance with the law.

IV. .

Under the law of Alaska, the logging company was entitled to a lien upon the logs cut by it for the agreed price of the labor done in securing the same.

Section 709, Compiled Laws of Alaska,
1913.

Day vs. Green; 127 Pac. 772 (Or.), 62 Or.
293.

W. T. Railway Co. vs. Tennas Bros. Co.,
145 Fed. 458.

Chapman vs. Brewer, 62 N. W. 320
(Neb.)

Jones on Liens, Section 720.

Hogan vs. O'Neill, 5 N. W. 490.

Carver vs. Bagby, 81 N. W. 757 (Minn.)

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(Minn.)

Hopkins vs. Jamieson-Dickson Mill Co.,
39 Pac. 815.

Blumauer vs. Clock, 64 Pac. 844.

O'Connor vs. Burnham, 95 Pac. 1013.

Martin vs. Wakefield, 42 Minn. 176.

V.

The fact that the logs cut by the logging company may have been confused with other logs and cut into lumber, does not extinguish the lien.

Fischer vs. Cone Lbr. Co., 49 Ore. 277;
89 Pac. 737.

Day vs. Green, 62 Ore. 293, 172 Pac. 772.
Schultz vs. Shively, 72 Ore. 450; 143 Pac.
1115.

ARGUMENT.

THE LOGGING COMPANY OUGHT NOT TO
LOSE THE BENEFIT OF THE WORK
DONE BY IT BECAUSE OF INACCUR-
ACY IN PREPARATION OF THE PA-
PERS FILED BY IT IN SEEKING TO
COMPLY WITH THE ALASKA CORPOR-
ATION LAWS.

Very little attention will be given in this

brief to the question of the right of the logging company to collect for its work on at least a general claim. It is believed that this question is set at rest by the decision of District Judge Jennings, against which a petition for review was filed in this Court and decided in 266 Fed. 692. Holding this view of the case, it is not considered important to devote extended argument to this question.

However, if the question were open for discussion here, it is sufficient to say that the statute of Alaska (Sec. 660) only renders contracts with citizens of the Territory of Alaska void and does not make contracts with corporations formed outside of Alaska void. It was upon this ground that the District Judge based his opinion sustaining the right of the logging company to collect for its work. And further it is submitted that an examination of the papers filed by the logging company will disclose that they constitute a substantial compliance with the Alaska statute. They are inaccurate and incomplete but they do contain all of the information the statute was aimed to secure. All of the money due the Territory of Alaska as fees was paid and no one was injured by the inaccuracy in the preparation of the papers.

A CORPORATION IS A PERSON WITHIN THE MEANING OF THE LIEN LAWS.

The opinion of the Supreme Court of Nebraska in *Chapman vs. Brewer, et al* (*supra*) contains the following language:

“Another contention is that our statute provides for a lien in favor of ‘any person’ and not in favor of a corporation and that a corporation cannot acquire a lien under our statute. ‘Persons are divided by law into natural and artificial. Natural persons are such as the God of Nature formed us. Artificial are such as are created and devised by human laws for the purpose of society and government which are called “corporations” or “bodies politic.”—1 Blackstone’s Commentary 123. Enactments which related to persons would be variously understood, according to the circumstances under which they were used, as including or not including corporations. In its legal significance, it is said the word ‘person’ is a generic term and as such, *prima facie*, includes artificial as well as natural persons unless the language indicates that it is used in a more restricted sense. And further, ‘If any general rule can be drawn from the decisions, it would seem to be this: That where the act imposes a duty towards or for the protection of the public or individuals, or grants a right properly common to all, and from participation in which the limited character of corporate franchises and the

absence of any natural rights in corporations do not, by any policy of the law, debar them, the term persons will, in general, include them, whether the act be a penal or a remedial one.' See End. Interp. St., Sections 87 and 89 and cases cited. 'We are satisfied that the word 'persons' in our Mechanic's Lien Law, include an artificial person or corporation.'"

This is the rule of the authorities and we submit that it is well founded both in precedent and in reasoning.

THE ALASKA STATUTES EXTENDED THE
RIGHT OF THE LOGGER'S LIEN AS
WELL TO THOSE WHO FURNISHED
LABOR AS TO THOSE WHO PHYSICALLY PERFORMED IT.

The brief already filed herein on behalf of the logging company so far disposes of the issue as to the effect of the Alaska lien statute that it is not believed that much can be added to it. There seems to have been a direct conflict among some of the earlier authorities, and this conflict has led the writers of such texts as are cited by the District Judge in his memorandum opinion into loose statements of the effect of the authorities. As is pointed out in the opening brief, most of the authorities which oppose the contention of the logging company arise under statutes different in language than the Alaska statute.

The true effect of the authorities can best be determined from a common-sense consideration of the language of the statute and of the reasoning of the different cases. In the first place the Alaska statute does not contain any of the restrictive words or phrases which resulted in the holdings of such courts as the Maine court. In that state the Legislature used the expression "personal services" with a view of limiting the lien claimant to a lien for the services performed by him. The Alaska statute, however, is in general terms. Nothing in the language of the statute indicates a disposition to restrict its interpretation or to limit its effect. The District Judge seems to have misconceived the true rule of construction of such statutes. He used the expression that the statute is in derogation of the common law, as indicating that it should be strictly construed. He proceeded further to the observation that it is also a remedial statute and must be liberally construed, so as to effect the intent of the Legislature. His reasoning seems to be that the scope of the statute must be determined by a strict construction of its language, and then that it is to be liberally construed within its limited scope. Nothing could be farther away from the true rule. While it is true that the intent of the Legislature must be determined by consideration of the language of the statute, it is equally true that in the interpretation of the language the court will look to the evil sought to be remedied, and will give the language that interpretation which most effectually supplies the remedy.

The District Judge referred to the case of *Breault vs. Archambault*, 64 Minn. 420, with the observation that it simply holds that a blacksmith employed at the camp, in shoeing horses and repairing sleds, and in mending and keeping in order the tools used by the men actually engaged in a common enterprise, is also entitled to a lien. We think the authority is of much more value than the court indicated in its opinion. The statute in question in that case read:

“Any person who may do or perform any **manual labor** in cutting, banking, driving, rafting, cribbing, or towing any logs, shall have a lien thereon for the amount due for such services.”

The court, having observed that the opponents of the lien claimed a strict construction of the statute and sought to limit its application to those persons who actually and personally performed the work, proceeded with the following language:

“That the statute in question was enacted to correct an abuse and to remedy an evil which had grown to enormous proportions, is a matter of common history. Many owners of pine land habitually entered into logging contracts with reckless and irresponsible parties, the purpose and inevitable result being that the men who did the work were unable to collect their wages. The statute was passed to protect these men,

and the interests of labor and a sound public policy require that it be liberally construed; that a construction be placed upon it which will protect all who, in furtherance of the common object, go into the logging camp and there engage in the business of converting trees into logs and timber, in hauling the same to the banks of the streams, and there driving or rafting the product of their labor to market. * * *

“The policy of this court, when required to construe the log lien law, was announced in *Martin vs. Wakefield*, 42 Minn. 176. It was there declared to be a remedial statute, to be liberally construed to advance the remedy. * * *

“As before stated, the plaintiff in the *Lane* case furnished, at the request of the contractors, two teams, and two teamsters, to care for and drive the teams, at a gross price per month for each team and teamster. If plaintiff had driven these teams, the case would be covered by that of *Martin vs. Wakefield*, 42 Minn. 176, in which it was held that, when a man and team were employed at a gross price for both, his lien on the logs extended to the use of the team. But the difference is, that plaintiff *Lane* performed no manual labor personally, all being done by the hired teamsters. But we cannot assent to defendants' contention that there is a marked distinction between the cases. Plaintiff was acting through her

servants, and the terms of the statute, under the application of the maxim, 'He who acts through another acts himself,' are logically applicable to one who provides teams with which to haul logs, and men to drive the teams, as did the plaintiff Mrs. Lane. * * *

"We are of the opinion that, although she performed no manual labor in person, she did through her servants, and for their services and for the work done by her teams, is entitled to a lien. Should we hold otherwise, a person who had gone into the woods with a team under an agreement to haul would be deprived of a lien if disabled by an accident, and for that reason compelled to hire a substitute to handle the team. The language found in the statute should be construed as broadly as its common use will warrant, which would include such labor and services when performed by servants and agents, as well as personally, in a common count in assumpsit for work and labor. See Hogan vs. Cushing, 49 Wis. 169, a case in which it was held that a plaintiff could maintain a log lien, although the work was performed by his teams and servants. See, also, Perry vs. Duluth, etc., Ry. Co., 56 Minn. 306, in which it was held that one who let his teams and teamster to a sub-contractor to do work in constructing a railway was entitled to a lien under General Statutes, section 6231."

It will thus appear that the case cited is a

very well considered and effective authority for the proposition that, notwithstanding the restrictive words contained in the Wisconsin statute, it should be so construed as to extend a lien to one who furnishes labor as well as to one who physically performs it. The case also is a very early expression of the principle which is now settled beyond question that statutes extending liens for labor should receive a very liberal construction for the purpose of advancing the remedy.

This brings us to a consideration of the nature of the remedy to be advanced. Some of the earlier cases proceeded upon the theory that the object to be attained by the lien statutes was the protection of such ignorant and uninformed persons as made up the class of laborers, something after the manner of the rules of the maritime law, as they affected sailors. It is not believed that any statute ever passed in any of the states of the Union, or in its territories, ever contained language supporting such a doctrine. It was purely a court-made doctrine and it has long since been exploded. The lien statutes now extend the right of lien to every one who benefits the property of another by work furnished or performed or by material furnished. The class of persons to whom the lien claimant belongs has nothing whatever to do with the matter. The statutes are founded upon the principle of justice, which assures to the person performing work, furnishing work, or furnishing material the right

to be paid out of the thing the value of which he has enhanced. It is the theory of these statutes that no injustice is done to any one by holding the property benefited by work or material as security for the payment of the sums due for the work or material. In every enlightened community it is the common and every-day experience to find wealthy corporations and individuals claiming liens for labor and material furnished. The statutes of all the western states provide liens for contractors as well as laborers, and while these statutes afford no particular authority in a case of this kind, since their language expressly extends them to contractors, they do supply the court with a definite criterion by which to determine the nature of the remedy sought to be supplied by the lien laws. From these statutes, from the authorities herein cited, and from the language of the Alaska code in question, it is clear beyond debate that the remedy sought to be supplied is not the protection of a particular class of persons who, by reason of their ignorance, are unable to protect themselves, but is the enforcement of a simple rule of common fairness and right, that whoever has enhanced the value of a particular article by labor, whether performed by himself or by his agents, or by materials, whether he personally applied them or caused them to be applied, is entitled to look to the article whose value he has enhanced for the payment of his just charges for the labor or material.

Not contemplating the hypercritical attitude of lawyers in the construction of lien statutes, the Legislature used language of a general and sweeping character with the intention that it should be so construed as to include every case which could reasonably be brought within the common understanding of the language used. To indicate the nature of language used in various statutes, attention is called to Section 10191, Oregon Laws. After many amendments the law finally stands as follows:

“Every mechanic, artisan, machinist, builder, contractor, lumber merchant, laborer, teamster, drayman, and other persons performing labor upon or furnishing material or transporting or hauling any material of any kind to be used in the construction * * * shall have a lien upon the same for the work or labor done or transportation or material furnished at the instance of the owner of the building or other improvement or his agent.”

It will be noted that this statute, for all the care that has been used in attempting to close the mouth of every captious objector, still uses the words “performing labor.” To say that it should not be so construed as also to include those who furnish labor and that where the contractor is a corporation to entitle it to a lien for the contract price, would not only run counter to the clear intention of the statute but would upset the existing order of business in the State of Oregon, where the statute pre-

vails. It is a daily experience in Oregon for liens to be filed and foreclosed under this section at the instance of corporation contractors, which include large sums of money accruing for labor furnished by the contractor. It would be possible to base a sort of argument upon the proposition that the statute refers to those who perform labor and those who furnish material, and that therefore no one but those who physically perform the labor could claim a lien for labor, while those who claim liens for material are put upon a different basis.

The same construction of the words "perform labor" which is prevalent in the State of Oregon, when applied to section 709 of the Alaska code, entitles the logging company to a lien. All that is necessary by way of construction to entitle the logging company to a lien in this case is to construe the word "person" to include artificial as well as natural persons, and to construe the language "performing labor upon or who shall assist in obtaining or securing" to include those who perform labor or render assistance by others as well as in person. The authority already cited conclusively establishes the rule of statutory construction that where the word "person" is used without restriction it should be construed to include artificial as well as natural persons, unless the contrary plainly appears; and the rule propounded in the case herein quoted from, that he who performs work by others as effectually performs it as though he had done the work with his own hands, seems to the writer

of this brief to be effectually settled, both as a proposition of principle and as a proposition of authority.

The case at bar offers a concrete illustration of the evil sought to be remedied by the lien statute. Four young men agreed to cut logs at \$10.00 per thousand. The only distinction between such an agreement and a hiring by the day was in the manner of payment. It is true the arrangement was a contract, but so is every hiring a contract. The relation of master and servant is contractual in its nature, and it may exist even though the scale of compensation is fixed upon the quantity of work performed rather than upon the period of time consumed. The piece worker is a laborer exactly as the employe who works by the day is a laborer. These young men worked with their own hands. They worked much harder than any of the persons who have had to do with the long drawn-out litigation through which they seek recovery for the result of their efforts. The referee, in his statement of the facts, observed that they worked twelve hours per day and seven days per week at the very hardest kind of manual labor. It is true they also employed others to work, and having employed those others they paid them with money they had earned theretofore by the like vigorous efforts. They had theretofore formed a corporation, for convenience only. They owned all its stock, and so far as the effect in this case is concerned it did no more than to supply them with a convenient means of keep-

ing their accounts between themselves. The work they did so far enhanced the value of the logs that they cut as to supply the lumber company with the material for its operations. It is reasonable to suppose that the logs, when delivered at the mill, were worth to the lumber company, its stockholders and its creditors, a sum of money in excess of the price agreed to be paid to the loggers and the stumpage paid to the Government. If the logs were not worth more than the cost, then it is reasonable to presume that the lumber company would not have contracted for their delivery. If they were worth as much or more, then the added value was the property of the young men forming the logging company until it had been paid to them. It was their property by every rule of right and justice which could possibly be invoked, and if there had been no law, their right to it is so firmly grounded upon every principle of human fairness that it would not be questioned by honest men.

Now what is sought to be accomplished in the present proceeding? Simply this: That the mill company's other creditors seek to seize upon the logs in their enhanced state and to take to themselves the benefit of the labor performed and furnished by these four young men. And upon what theory do they seek to accomplish this result? Why because it is contended that having operated their business under a corporate name and having performed the work required of them by themselves and others, the young men had given to other cred-

itors of the corporation the result of their work.

It is not doubted that such a result as was accomplished in the court below can be brought about by the operation of law. Gross injustice is possible under the guise of law enforcement. But where such a construction of a statute is sought as will take from one that which by every principle of right and justice belongs to him and give it to another who has no honest claim upon it at all, the intention of the law to accomplish such a result ought to be clear and plain. Before such a construction can be given a statute there should be no doubt at all of that result having been contemplated by the framers of the statute.

In the case at bar a strained construction of the statute must be indulged to accomplish the extinguishment of the lien of the logging company, and we respectfully submit that nothing in the relation of the parties or the wording of the statute calls for any such strained construction.

ARTHUR I. MOULTON,
Of Attorneys for McDonald-Weist
Logging Company.

United States⁸
Circuit Court of Appeals
For the Ninth Circuit.

ALASKA PACKERS' ASSOCIATION, a Corpora-
tion,

Plaintiff in Error,
vs.

D. J. GOVER,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
District of Alaska, Division No. 1.

FILED
JUL - 6 1921
F. D. MONCKTON
CLERK

United States
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Names and Addresses of Attorneys of Record.

H. L. FAULKNER, Juneau, Alaska,
Attorney for Plaintiff in Error.

A. H. ZIEGLER, Ketchikan, Alaska,
Attorney for Defendant in Error. [0*]

In the District Court for the District of Alaska,
Division Number One, at Ketchikan, Alaska.

No. 411-KA.

D. J. GOVER,

Plaintiff,

vs.

ALASKA PACKERS' ASSOCIATION, a Corpo-
ration,

Defendant.

Amended Complaint.

Comes now plaintiff and for cause of action
against defendant alleges as follows:

I.

That plaintiff now is, and was at all times herein-
after mentioned, a resident and inhabitant of the
Territory of Alaska.

II.

That defendant now is, and was at all times here-
inafter mentioned, engaged in the business of catch-
ing and canning salmon at Loring, Alaska, by means
of machinery and mechanical appliances; that in
conjunction with the operation of said cannery,
defendant, at all times hereinafter mentioned,

*Page-number appearing at foot of page of original certified Transcript
of Record.

owned, controlled and operated a salmon hatchery, which was also carried on by means of a sawmill, machinery and mechanical appliances.

III.

That on or about April 19, 1920, plaintiff was, and had been for a long time prior thereto, employed by defendant as a laborer in connection with the operation in the manner and by the means aforesaid of said salmon hatchery.

IV.

That at Loring, Alaska, on said April 19th, 1920, the plaintiff was directed by the superintendent, or person directly in charge of said hatchery, to dismantle an old flume constructed of boards about twenty feet from the ground; that said flume was reached only by means of a stationary ladder running from the ground to said flume; that while plaintiff was actually engaged in said work, he placed his right hand on the top rung of said ladder, preparatory to descending same to the ground; that while [1] so descending, the said rung broke loose and gave away, precipitating plaintiff violently to the ground a distance of approximately twenty feet; that the plaintiff landed on the ground beneath, striking with great force on his left hip, side and shoulders; that plaintiff was rendered almost unconscious from the shock of said fall; that he thereby sustained severe injuries to his spine, hips and legs, and suffered severe and permanent internal injuries; that the place above mentioned where plaintiff was injured was and is a part of the works belonging to defend-

ant and with which the defendant carried on its business of operating said hatchery and catching and canning salmon.

V.

That as a result of said injuries plaintiff has suffered great pain of body and distress of mind; that the said injuries are permanent in character rendering plaintiff practically helpless; that ever since said accident he has suffered and will continue to suffer great pain; that plaintiff is wholly unable to work and will continue through life to be wholly unable to work or to support himself.

VI.

That the place where and ladder by which plaintiff was injured were entirely under the management, control and supervision of the defendant; that the rung that broke loose and gave away, as above described, and the timbers to which said rung was fastened by nails, were very old, rotten and wholly unsuitable and unfit for the purpose for which they were used; that the defendant knew, or ought to have known, the condition of said rung and timbers; that the plaintiff did not know, and had no means of knowing, the condition of said rung and timbers; that the plaintiff was in the discharge of his duties at said time and was without fault on his part; that it was the duty of defendant to exercise ordinary care to keep said ladder in reasonable repair; that defendant was negligent in failing so to do; that plaintiff's injuries were caused by gross carelessness [2] and negligence of defendant in failing to exercise ordinary care

in keeping said rung, timbers and ladder in reasonable repair.

VII.

That plaintiff was at the time of the accident above mentioned in good health, was earning and capable of earning the sum of approximately \$150 per month; that as aforesaid the plaintiff was, and now is, dependent upon his own efforts for support.

WHEREFORE plaintiff prays for judgment against the defendant in the sum of \$20,000, together with his costs and disbursements herein expended.

ZIEGLER & GORE,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

D. J. Gover, being first duly sworn, on oath deposes and says: I am the plaintiff in the above-entitled action, have read the foregoing amended complaint, know the contents thereof and the same is true as I verily believe.

D. J. GOVER,
Plaintiff.

Subscribed and sworn to before me this 21st day of Oct., 1920.

[Notary Seal]

A. H. ZIEGLER,
Notary Public for Alaska.

Filed in the District Court, District of Alaska,
First Division. Oct. 23, 1920. J. W. Bell, Clerk.
By V. F. Pugh, Deputy.

Copy received and service admitted this — day
of Oct., 1920.

H. L. FAULKNER,
Attorney for Defendant. [3]

In the District Court for the District of Alaska,
Division Number One, at Ketchikan.

No. 411-KA.

D. J. GOVER,

Plaintiff,

vs.

ALASKA PACKERS' ASSOCIATION, a Corpo-
ration,

Defendant.

Amended Answer to Complaint as Amended.

Comes now the defendant, leave of Court being
first had, and files this its amended answer to the
plaintiff's amended complaint, and admits, denies
and alleges as follows:

I.

Defendant admits the allegations contained in
paragraph one.

II.

Referring to the allegations contained in para-
graph two, defendant admits that during a portion
of each year it is engaged in the business of catching
and canning salmon at Loring, Alaska, by means
of machinery and mechanical appliances; admits
that it owns, controls and operates a salmon hatch-

ery; denies that it was engaged in the business of catching and canning salmon on April 19, 1920, and denies each and every other allegation contained in said paragraph.

III.

Referring to the allegations contained in paragraph three, defendant admits that on April 19, 1920, plaintiff was in its employ, and admits that plaintiff had been in the employ of defendant since July, 1919, as a laborer, and denies each and every other allegation contained therein.

IV.

Referring to the allegations contained in paragraph four, defendant admits that on April 19, 1920, the plaintiff was directed to dismantle an old flume constructed on boards, the top of which was twenty-five feet from the ground; admits that the top of said flume was reached by means of a stationary ladder [4] running from the ground to the top of said flume, and alleges that said ladder was a portion of said flume and was built into said flume; and defendant denies each and every other allegation contained in said paragraph.

V.

Referring to the allegations contained in paragraph five of said complaint, defendant denies each and every one of same.

VI.

Referring to the allegations contained in paragraph six, defendant denies each and every one of same.

VII.

Referring to the allegations contained in paragraph seven, defendant denies that plaintiff was earning the sum of One Hundred and Fifty Dollars (\$150.00) per month at the time of the accident; and denies that plaintiff was earning any sum, except the sum of Three Dollars and Eighty-five Cents (\$3.85) per day for each day he was actually employed by defendant.

And for a further and affirmative defense to the allegations set forth in plaintiff's complaint, the defendant alleges:

I.

That defendant is a corporation duly and regularly organized and authorized to do business, and doing business at all times mentioned herein in the Territory of Alaska, and has paid its annual corporation license taxes due to said Territory.

II.

That on April 19, 1920, plaintiff was in the employ of defendant as a laborer, and on said day was engaged in dismantling a certain flume belonging to the defendant at its hatchery near Loring, Alaska. That the top of said flume was reached by means of a ladder extending from the ground upwards. That plaintiff was thoroughly familiar with the condition of said flume and with the condition of said ladder, and that if said ladder were defective and the top rung of same broke and plaintiff fell to the ground, the said [5] accident was caused solely by the negligence of the plaintiff, and the risk of the same was one of the ordinary, usual, apparent

and obvious risks and hazards incident to plaintiff's employment, and the said risk was assumed by plaintiff.

WHEREFORE, defendant prays that this action be dismissed and that it have and recover from the plaintiff its costs and disbursements herein.

H. L. FAULKNER,
Attorney for Defendant.

United States of America,
Territory of Alaska,—ss.

I, H. L. Faulkner, being first duly sworn, depose and say: That I am the attorney in fact and agent of the Alaska Packers' Association, a Corporation, and make this affidavit on its behalf. That I have read the foregoing answer and know its contents, and that the facts stated therein are true and correct, as I verily believe.

H. L. FAULKNER.

Subscribed and sworn to before me this 23d day of November, 1920.

[Notary Seal]

A. W. FOX,
Notary Public for Alaska.

My commission expires June 11, 1922.

Service admitted this 29th of Nov., 1920.

ZIEGLER & GORE.

Filed in the District Court, District of Alaska,
First Division. Nov. 29, 1920. J. W. Bell, Clerk.
By L. A. Green, Deputy. [6]

In the District Court for the District of Alaska,
Division Number One, at Ketchikan.

No. 411-KA.

D. J. GOVER,

Plaintiff,

vs.

ALASKA PACKERS' ASSOCIATION, a Corpora-
tion,

Defendant.

Reply to Amended Answer.

Comes now the plaintiff and for reply to the answer of defendant as amended, filed herein, alleges as follows:

I.

Plaintiff for reply to paragraph IV of defendant's amended answer denies that the stationary ladder running from the ground to the top of the said flume was a portion of said flume or that it was built into said flume, and in this connection avers that he was not directed to dismantle said ladder or any portion thereof.

For a reply to defendant's affirmative defense set forth in defendant's amended answer, the plaintiff alleges, admits and denies as follows:

I.

Plaintiff admits the allegations of paragraph I of defendant's affirmative defense.

II.

Plaintiff denies that he was thoroughly familiar

with the condition of said flume and with the condition of said ladder; denies that said accident was caused solely by the negligence of plaintiff, or on account of any negligence on the part of the plaintiff whatsoever; denies that the risk of same was one of the ordinary, usual, apparent and obvious risks and hazards incident to plaintiff's employment, and the said risk was assumed by plaintiff, and in this connection avers that the accident and injury was caused by the defects of and insufficiency of defendant's works and appliances due to the negligence of [7] defendant and its officers as alleged more specifically in the plaintiff's complaint.

WHEREFORE plaintiff prays for judgment as in his amended complaint set forth and prayed for.

ZIEGLER & GORE,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

D. J. Gover, being first duly sworn, on oath deposes and says:

I am the plaintiff in the above-entitled action, have read the foregoing amended reply, know the contents thereof and the same is true as I verily believe.

D. J. GOVER,
Plaintiff.

Subscribed and sworn to before me this 1st day of December, 1920.

[Notary Seal]

A. H. ZIEGLER,
Notary Public for Alaska.

Filed in the District Court, District of Alaska,
First Division. Dec. 2, 1920. J. W. Bell, Clerk.
By —————, Deputy. [8]

In the District Court for the District of Alaska,
Division No. One, at Ketchikan.

No. 411-KA.

D. J. GOVER,

Plaintiff,

vs.

ALASKA PACKERS' ASSOCIATION, a Corpo-
ration,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that this cause came
on regularly to be heard on the 2d day of December,
1920, before the Honorable ROBERT W. JEN-
NINGS, Judge of the United States District Court
for the District of Alaska, Division No. 1, held at
Ketchikan, and a jury having been impanelled and
sworn, the following proceedings were had: [9]

Testimony of G. F. Heckman, for Plaintiff.

G. F. HECKMAN, called as a witness on behalf
of the plaintiff, being first duly sworn, testified as
follows:

Direct Examination.

(By Mr. ZIEGLER.)

Q. State your name. A. G. F. Heckman.

(Testimony of G. F. Heckman.)

Q. What position do you occupy with the Alaska Packers' Association?

A. Superintendent of the Loring cannery.

Q. How long have you been such superintendent?

A. Just two years.

Q. I will ask you to state whether the Alaska Packers are engaged in the business of catching and canning salmon in the Territory of Alaska.

A. Yes, sir.

Q. By means of machinery and mechanical appliances? A. Yes, sir.

Q. During certain portions of the year they are actually engaged in canning salmon at the cannery?

A. At the cannery; yes.

Q. And during the other portion of the year, the portion of the year from the early spring up until the canning season, they are engaged in preparatory work? A. Yes.

Q. Now, you know where the hatchery belonging to the defendant is located? A. Yes.

Q. That is a short distance from the cannery?

A. Yes—seven miles.

Q. State whether or not there is a sawmill at that hatchery.

A. Yes, there is one there, they operate once in a while to cut a little lumber.

Q. Operate once in a while for what purpose?

A. Cutting lumber for the hatchery. [10]

Q. Have you had occasion to see this particular structure from which Mr. Gover claims he fell?

(Testimony of G. F. Heckman.)

A. I have seen the mill but I have never seen the place where he fell.

Q. You have not seen the place where he fell but you know that it is part of the sawmill? A. Yes.

Q. Part of the ways and works of the sawmill; is that correct?

A. Yes, as far as I know—I don't just exactly remember—

Q. Now, Mr. Heckman, your company, in consideration of the salmon fry released at the hatchery, is exempted a certain portion of the taxes; isn't that correct? A. I think so.

Q. On account of releasing the fry at the hatchery? A. Yes.

Q. So that the hatchery is in a measure operated in conjunction with all the defendant's canneries?

A. Well, I don't know.

Q. Well, by operating the hatchery—

Mr. FAULKNER.—I object to this question as incompetent, irrelevant and immaterial. I do not think it makes any difference what the arrangement is about taxes or releasing the fry.

The COURT.—What is the purpose, Mr. Ziegler?

Mr. ZIEGLER.—I have alleged in the complaint that the hatchery was operated in conjunction with the canneries of the defendant and is therefore a part of their business of catching and canning salmon in Alaska by means of machinery. It is a necessary element of proof in order to bring the case within the employer's liability act.

Mr. FAULKNER.—The question would be

(Testimony of G. F. Heckman.)

whether the hatchery is operated by machinery. That is the only question that we can inquire into under the pleadings.

The COURT.—Is this suit brought under the employer's liability act?

Mr. ZIEGLER.—Yes, your Honor. [11]

Mr. FAULKNER.—We contend that we do not come under the employer's liability act, but the question would be, if he wants to show that we come under the act, that the hatchery is operated by machinery.

Mr. ZIEGLER.—Under the compensation act—the act of 1913—Session Laws of 1913, page 84—which provides, your Honor, that any corporation engaged in business by means of machinery and mechanical appliances shall be liable to any of its employees, etc., that are injured. The act says nothing about whether any particular branch has to be carried on by machinery. The act is a very broad act and says that any person who is engaged in business or is carrying on a business by means of machinery and mechanical appliances shall be responsible for any injuries due to defects or negligence of the defendants, its agents, officers and employees, in the ways, works, etc.

The COURT.—It is a question of law which I can decide later, and it does not affect the facts of the case. It will be admitted, subject, of course, to your objection.

Q. The hatchery is in a measure operated in conjunction with all the defendant's canneries?

(Testimony of G. F. Heckman.)

A. I don't know whether I know or not.

Q. You don't know?

A. The Packers never told me what they were doing—only just what I heard.

Q. You do know that in consideration of releasing these salmon fry the company is exempted from taxes, don't you? A. Yes,—just what I heard.

Mr. FAULKNER.—I object to that as immaterial—that has no bearing on the question at all.

The COURT.—That is the foundation upon which he predicates his contention that the defendant comes under that act. He may answer that question.

Q. You answered that question, didn't you?

A. Why, I don't know only hearsay. The Packers never told me and I never asked them.
[12]

Q. You say your company never told you?

A. No, they never told me in regard to how the hatchery is run and I never questioned them.

Q. You understand that that is the way it is run?

A. That is what I understand.

Q. You are the superintendent at Loring?

A. Yes.

Mr. ZIEGLER.—That is all.

Cross-examination.

(By Mr. FAULKNER.)

Q. You are the cannery superintendent at Loring? A. Yes.

Q. How far is the hatchery from the cannery?

A. Must be between 7 and 8 miles.

(Testimony of G. F. Heckman.)

Q. Any connection between them?

A. In what way?

Q. How do you go from the hatchery to the cannery? A. We go by boat and over land.

Q. Part of it is by water and part by land?

A. Yes.

Q. Across several lakes?

A. Across several lakes; yes.

Q. And the hatchery is a separate institution?

A. Yes.

Q. And it is carried on by means of machinery?

A. Only the sawmill—the other is not run by machinery, I don't think.

Q. Do you know when the sawmill is operated—do you know anything about that? A. No.

Q. Do you go up to the hatchery very often?

A. Not very often.

Q. Who is the superintendent of the hatchery?

A. Mr. Fred Patching. [13]

Q. He is in full charge? A. Yes.

Q. You are the cannery superintendent?

A. At Loring; yes.

Q. How much of the time are you there?

A. From the first of April to October some time.

Q. What is the season for hatching salmon in the hatchery? A. I don't know that.

Q. It is after you leave, isn't it? A. Yes.

Q. Late in the fall? A. Yes.

Mr. FAULKNER.—That is all.

(Witness excused.)

Testimony of David J. Gover, in His Own Behalf.

DAVID J. GOVER, the plaintiff, upon being called as a witness in his own behalf, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ZIEGLER.)

Q. State your name, Mr. Gover.

A. David J. Gover.

Q. You are the plaintiff in this case?

A. Yes, sir.

Q. How long have you resided in Alaska, Mr. Gover?

A. Well, it is a little over a year and a half, I guess, now. I came in June—or May,—May or June.

Q. Speak a little louder.

A. It is something like a year and a half. I came up, I think, last May,—last May a year ago.

Q. Are you a married man, Mr. Gover?

A. Yes, sir.

Q. Have a family? [14] A. Yes, sir.

Q. Now, state whether or not you ever worked for the Alaska Packers.

A. Yes, sir; I worked for the Alaska Packers,—I left here the night of the 4th of July,—a year ago last Fourth.

Q. That was 1919? A. Yes, sir.

Q. You started for Loring? A. Yes, sir.

Q. Where did you work?

A. Well, the next day—

(Testimony of David J. Gover.)

Q. No, I mean where did you work, at Loring or the hatchery? A. At the hatchery.

Q. And you started in there shortly after the 4th of July?

A. Yes, sir; I went up on the 5th and started in to work on the 6th.

Q. And as what did you hire out,—what did you hire out for? A. Just a common laborer.

Q. What has been your business practically through your entire life?

A. Well, I have been prospecting a great deal since about along in the '70's.

Q. Were you prospecting just shortly before you went to work at Loring? A. Yes, sir.

Q. Whereabouts?

A. Why, up in the Rainy Hollow District.

Q. Up above Haines?

A. Yes, sir—west of Haines.

Q. Now, just state briefly what was the nature of your work over there at the hatchery.

A. Well, really it was,—I cut some wood, grubbed some—just anything that came up, and when the fish came on I did what they call washing the eggs—put them in a basket and wash them.

Q. Just general all around work over there?

A. Yes, sir. [15]

Q. State whether or not you were injured at any time at the hatchery.

A. Yes, sir, I was injured there the 19th of April.

Q. The 19th of April, 1920? A. 1920.

Q. This year? A. Yes, sir.

(Testimony of David J. Gover.)

Q. How were you injured? A. Well, by a fall.

Q. You were injured by a fall? A. Yes, sir.

Q. From what did you fall? A. From a ladder.

Q. How did you happen to be up on that ladder?

A. Well, Mr. Patching sent me up there to take down some boards off the old flume—the over-shot boards that came down this way.

Q. Just a moment—I will get you to testify from this sketch so the jury will know the place you fell from. Now, the place you fell from, Mr. Gover, state whether or not that was a part of the sawmill.

A. Yes, sir.

Q. Had that been used during the time you were there in connection with the operation of the sawmill?

A. Just the flume carrying off water.

Q. And this ladder went up alongside of a house, didn't it?

A. An old wheel-house—what we call a wheel-house—there was an old wheel in there.

Q. Was there a wheel enclosed in the house?

A. Yes, sir.

Q. What was that used for?

A. It had been used for water-power.

Q. For what purpose?

A. For running the sawmill. [16]

Q. State whether or not this wheel-house was a part of the sawmill.

A. Yes, sir, it was a part of the sawmill.

Q. Now, I will ask you if that sketch fairly represents the wheel-house and the ladder to the flume on

(Testimony of David J. Gover.)

the day that you were injured?

A. Well, that is a pretty fair representation, I should say.

Q. It is not drawn to scale or anything like that?

A. No.

Q. Just a general idea?

A. Just a general idea, yes, sir.

Q. Now, will you state what portion of this would represent the wheel-house? Mark it with the letter A. A. You will have to mark it right here.

Q. That would be the house that enclosed the wheel?

A. Yes, sir,—it went right up the side this way.

Q. Mark that with the letter A. Now, will you point to the ladder upon which you ascended.

A. Right here.

Q. That would be marked by the letter B. Now, you stated you were engaged in taking down some boards from a flume on that day?

A. Yes, sir—the over-shot.

Q. The over-shot of the flume. Will you point to that on this sketch? A. This represents it.

Q. The slanting portion there?

A. Yes, sir—two sections of boards.

Q. That is marked with the letter C. Will you state what these two lines running along here represent?

A. That was supposed,—this would be the tram where we brought logs from the lake up to the saw-mill.

Q. That would be the tramway that the logs came

(Testimony of David J. Gover.)

up to the sawmill on? A. Yes, sir. [17]

Q. That is marked with the letter D. Now, Mr. Gover, will you state about how high this ladder was—that is, the top of the ladder, where it reached the flume, from the ground?

A. Well, I thought it was something over 20 feet.

Q. You think it is something over 20 feet?

A. I think so, yes, sir—over 20 feet,—probably it was 25—I never measured it.

Q. If the defendant states it was 25 feet—admits it was 25 feet, you would take that as a correct measurement?

A. Yes, sir, because I had an idea it was over 20 feet, and I am not positive, but I think it was probably 25.

Q. What would you state about the distance from the top of the ladder to the old portion of the flume that you were instructed to dismantle,—what would be the distance?

A. Oh, it might have been 6 or 8 feet probably.

Q. 6 or 8 feet? A. Yes—I couldn't say just how much.

Q. That is your best estimate?

A. I think so—probably not so far.

Q. Now, what time in the day was it you were directed to do this work. A. It was afternoon.

Q. After the lunch hour?

A. After one o'clock; yes, sir.

Q. Who gave you the instructions?

A. Mr. Patching, the superintendent.

Q. He is the superintendent? A. Yes, sir.

(Testimony of David J. Gover.)

Q. What were his instructions? Explain by referring to this sketch.

A. He told me, he said, "I want those boards taken off. There are some old ones down here." "Now," he said, "this lower part, leave this—we don't want to bother this at all, only the old ones; take those off and they will do for wood; and those boards that come down here, we want them laid down here [18] to put on the fence." I had been working putting up fence posts, and he—

Q. Did Mr. Patching tell you how to get up to the place where you were to perform this work?

A. Why, certainly.

Q. What did he say?

A. He said, "Go up the ladder there." I said, "How am I going to do that?" He said, "Get a rope and a peavey, or something to get them loose, and take them down."

Q. Did you get a rope and peavey? A. Yes, sir.

Q. And went up the ladder? A. Yes, sir.

Q. When you reached the top of the ladder, marked B, Mr. Gover, state whether or not you had to go towards the point marked C to perform your work?

A. Certainly I did, to get this way.

Q. And in order to get there you had to walk on the flume?

A. Yes, sir,—I walked right on the flume; yes, sir.

Q. I will ask you, Mr. Gover, to explain to the jury how you happened to fall on that day.

A. Well, the way I happened to fall, I was going to come down this ladder here, and I had my left hand,

(Testimony of David J. Gover.)

as I come down, you understand, like this,—my right foot was about the fourth round, and my left hand was here and my right hand on this top round, and as I let loose with my left hand this one pulled out.

Q. Which one pulled out?

A. This one in my right hand.

Q. The top rung pulled out? A. Yes, sir.

Q. What happened then?

A. I fell—that is what happened, exactly, and if I could stand [19] up I would show you. My right foot being on this round, threw me back out quite a ways, and I tried to get my head between my shoulders, like this, because I was scared—I had a fall coming, gentlemen, and I knew it and I knew there was nothing to help me.

Q. There was no way by which you could grab the ladder and save yourself from falling?

A. I couldn't do nothing—I was out in the air, and falling.

Q. And you fell backwards down to the ground?

A. I fell down to the ground.

Q. Where did you strike when you landed on the ground?

A. I struck on my hips and back—right across here, and having my head down that way saved my head.

Q. You saved the back of your head—

A. Yes, sir; right like that.

Q. Did you strike on the ground or did you strike the tramway?

A. I think I struck the edge of the tramway be-

(Testimony of David J. Gover.)

cause this part of my body was under there and my head was sticking out, and I tried to turn over and I couldn't move only my left hand and my head—that was all I could move.

Q. You were working alone at the time?

A. Yes, sir, I was there alone.

Q. When you fell on the ground, Mr. Gover, did you notice the round that had pulled out anywhere?

A. When Mr. Orton helped me up I seen it laying there, yes, sir—I seen it laying on the tram—right on the tram.

Q. What did you observe the condition of the rung to be?

A. It was laying there and the nails were out, and on one side you could see rotten wood between the spikes.

Q. You could see rotten timber between the spikes?

A. Yes, sir, you could—you could see rotten wood between those spikes—pieces of rotten wood there.

Q. Now, in going up this ladder to perform your work, Mr. Gover, did you exercise the same degree of care that you did while about your other work? [20]

A. Yes, sir, I did.

Q. You looked at the ladder? A. Yes, sir.

Q. And you didn't notice at that time there was any defect in the ladder?

A. No, I did not. I thought it was just like the other things around there—it would be all right, and I just took it that it would be all right to go ahead,—just the same as I would come up the stairs here, or anything like that,—I went ahead with my work.

(Testimony of David J. Gover.)

Q. Why didn't you stop your work and make a careful inspection of this ladder?

A. I wasn't told to do that, sir.

Q. Mr. Patching had sent you up there, hadn't he?

A. Yes, sir.

Q. And you relied on the fact that he would—

Mr. FAULKNER.—I object to any more of these leading questions. I don't object to leading a little bit, but I think this last question is highly leading.

The COURT.—Yes, that last question is highly leading, Mr. Ziegler.

Q. You say Mr. Patching sent you up the ladder?

A. Yes, sir.

Q. And you followed his instructions?

A. I certainly did as near as I could—I always did.

Q. I will ask you, Mr. Gover, if it was any part of your instructions from Mr. Patching to take down this ladder or any portion of the wheel-house?

A. Oh, no, nothing said about that, only the over-shot and some top boards on the flume below—that was all—nothing said about the wheel-house or the ladder.

Q. No instructions given you to dismantle the ladder? A. No, sir.

Q. Any portion of the ladder? A. No, sir. [21]

Q. Did he tell you to take down any portion of the flume with the exception of what you have termed the over-shot, marked with the letter C there?

A. No, sir; only some old boards were off below and he said, "Be careful; don't hurt the flume be-

(Testimony of David J. Gover.)

cause we want to use that still." That was down here close to the ground.

Q. Did Mr. Patching tell you to be careful about the ladder, or anything of that kind?

A. He said, "Look out for those wires that go from the dynamo to the engine." He said, "Look out for those in letting the boards down."

Q. Not to break the wires?

A. Yes, sir, and not to break the lower flume.

Q. Did he tell you anything about the ladder?

A. No, sir.

Q. Did he warn you it was unsafe?

A. No, sir, he did not.

Q. Said nothing about it? A. No, sir.

Q. Now, who was the first person you saw after you fell, Mr. Gover?

A. The cook, Mrs. Grant. I hollered, tried to make a noise just as soon as I fell—screamed, and she came out and said, "What is the matter?" and I said, "I fell," and she run and got Mr. Orton.

Q. He was employed there at the place?

A. Yes, sir; I think he was at the blacksmith-shop over there, or some place working—she knew where he was.

Q. State whether or not they assisted you into the bunkhouse.

A. He came back then and then Mrs. Grant run and got Mr. Patching, and then he came.

Q. Now, Mr. Gover, I will ask you to state whether or not there were some staging—planking—around this wheel-house?

(Testimony of David J. Gover.)

A. Yes, sir, there was some staging out this way—it came out quite a little ways there that, mind you, when I fell I fell [22] out and I missed that staging, and I might have hit one brace that came up this way when I got down close to the tram.

Q. To the ground?

A. Yes, sir; but I fell out and I missed that staging entirely.

Q. Do you know how far it is between the logway marked with the letter D here and the bottom of the wheel-house marked A,—what is the space between them?

A. Oh, it might be 4 or 6 feet, now, but I never measured it—I judge it may be between 4 to 6 feet, maybe. It isn't so very far.

Q. And you say the rung of this ladder was laying on the logway? A. Yes, sir.

Q. The tram? A. Yes, sir.

Q. Do you know what time this was, Mr. Grover—what time of day?

A. Well, it was about 4 o'clock, I would judge—something about like four.

Q. How do you know that?

A. I know by looking at my watch just a little while before, when I was down with a board, and it was fifteen to four at that time, and then I had to work getting this board loose, and probably I was half an hour, or something like that, getting my rope and everything.

Q. When was the next time you looked at your watch? A. It was broke.

(Testimony of David J. Gover.)

Q. Broken from the fall? A. Yes, sir.

Q. At what time did your watch stop?

A. Fifteen after four, I think—I believe so, if I remember right—something like that.

Q. Now, what took place after you fell and Mrs. Grant and Mr. Orton came there?

A. Mrs. Grant went and got Mr. Patching, and they came back and got the tram car and put me on that and took me to the bunk house. [23]

Q. How were you affected by the fall at that time?

A. Well, I was very near paralyzed,—I couldn't use this arm, and I couldn't use my legs, and I hurt so bad that I don't think a man could hurt any worse,—I don't see how he could.

Q. Did you suffer much pain? A. Indeed I did.

Q. Were you confined to your bed after that?

A. Yes, sir; I was.

Q. For how long?

A. I couldn't say just exactly how long it was before I got out, but I know when I was in bed there that Mr. Archibald used to try to help turn me and he used to slide the blanket, was the only way I could stand it for several days.

Q. That was in turning over in bed?

A. Yes, sir.

Q. How long did you stay out at the hatchery after you were injured, Mr. Gover?

A. Well, sir, I couldn't say—I couldn't say just how long I was there,—six weeks, maybe.

Q. I don't want you to state exactly—as near as you can remember.

(Testimony of David J. Gover.)

A. Might have been six weeks—I am not sure.

Q. Did your condition improve any at that time?

A. Oh, yes, it improved some from what I was the first two or three weeks, because I tell you I couldn't even take a drink of water—I had to take water through a straw or some kind of little business to suck it through,—I couldn't take a cup and take a drink of water.

Q. How did you happen to come to Ketchikan?

A. Well, Mr. Patching said did I want to go to the hospital or see the doctor, and I told him whenever I thought I could stand it I would like to go down to the doctor, and I told him one day—Mr. Orton was coming and a young man the next day with mail, and I was coming down anyhow, and they said they would help me, so I came down. That was quite a little [24] bit after I had used crutches,—he got me a pair of crutches there and I used them; and I came down, and I had a pretty hard time getting down at all; I got down finally to the boat.

Q. You got down to Ketchikan?

A. To Loring. Mr. Patching phoned down to Mr. Heckman to give me an order for the doctor; and he said, "I am not going in"—Mr. Patching says, "but the bookkeeper will give you an order," and he did, and I came into Ketchikan.

Q. Did you go to see a doctor then?

A. Yes, sir; the next day.

Q. Who was the doctor? A. Doctor Ellis.

Q. Did he examine you?

A. Well, some,—he examined me around here, but

(Testimony of David J. Gover.)

then he didn't make a thorough examination like the other doctors did.

Q. Did Dr. Ellis state to you then how you were injured?

A. No, sir; he said there wasn't any bones broke.

Q. Said there were no bones broken?

A. Yes, sir.

Q. State whether or not he said you had rheumatism and that that was all that was the matter with you.

A. He didn't say that,—he said after while, "You ought to go to the springs," and he gave me a receipt or prescription to get some stuff down at Mr.—well, the drug-store—at Ryus', and when the drugman put that up I said, "What is that good for, anyhow?" He said, "Rheumatism." I said, "I ain't got rheumatism—I am hurt."

Q. Did you take that medicine?

A. I took a few doses of it—I took probably half of it.

Q. Did it do you any good?

A. It hurt me,—it hurt my kidneys.

Q. Did he examine you again after that?

A. Well, I went up there one evening and he examined me here where I had such an awful pain—right here; he said, "That [25] is the sciatic nerve right there between the two bumps there on the hip and the thigh bone there," and he said, "The sciatic nerve is what is hurt, or what is wrong," and he sent his man down and he got some,—oh, I don't know—a tube of some kind of salve or ointment and he rubbed me

(Testimony of David J. Gover.)

with that. He rubbed this ointment on, and that would relieve that spot there for probably an hour or so, but permanently it wouldn't do any good—didn't do any good, and they put on some kind of light.

Q. Did you explain to the doctor how you felt at that time—what the trouble was? A. Yes, sir.

Q. How were you suffering at that time?

A. Well, I was suffering with my—I was suffering on the inside here badly, and my legs were numb—no feeling in them at all—my feet.

Q. How were your internal organs at that time?

A. They were in bad shape all the time.

Q. Just explain the condition.

A. I could not have a passage without an injection at all—I haven't since I have been hurt.

Q. How was your bladder affected?

A. Very bad,—I couldn't hold my urine at all,—no control over it at all.

Q. The six weeks, or whatever time it was, you were at the hatchery, did you have any medical attention at all other than what Mr. Patching and the people there could give you? A. No.

Q. Did that same condition prevail out there with reference to your internal organs? A. Yes, sir.

Q. While you were at the hatchery? A. Yes, sir.

Q. After that second examination of Dr. Ellis, state whether or not you consulted any other doctor.
[26]

A. Yes, sir; after that,—well, I seen Mr. Heckman and he said—

(Testimony of David J. Gover.)

Q. Which Mr. Heckman?

A. Mr. Fred Heckman; and he said the doctor said there wasn't nothing the matter with me. I said, "I will have to see another doctor, then, if that is the case—if he don't know."

Q. At that time were you in the condition you have just stated? A. I were.

Q. State whether or not you were suffering pain.

A. I certainly was suffering pain.

Q. In what portions of your body?

A. Oh, from here down to about,—through my hips—right through here and here, and in my back, right here.

Q. What portion of your back—the lower portion?

A. Well, it is just a little above the hip.

Q. Whereabouts in your back—state whether or not it was near the spine.

A. Yes, sir; right back there—right in there.

Q. Then you stated you went,—finish your conversation with Mr. Heckman.

A. Mr. Heckman said, "I will have to go by what the doctor says, and he says there ain't nothing the matter with you." I said, "That is strange; I will have to see another doctor, then." "Well," he says, "we will take care of you for a while yet." "Well," I says, "that is all right—that is up to you," or something, "but I will have to see another doctor"; and he said, "We won't pay him." I said, "I cannot help that." So I went back to Mr. Ellis and he said, "We will see; maybe we will send you up to the springs"; and I said, "Well, now, there is

(Testimony of David J. Gover.)

good doctors down below—why don't you send me down there, down home? I want to go home, just like any other man would, I reckon, want to go home." "Well," he said, "we will see about it," but he didn't go to see about it, and the rays seemed to be making me worse at that time,—they would ease me at first for a while by warming up the [27] hip, but is seemed like it was getting worse all the time in my back.

Q. Then did you go to see Dr. Mustard?

A. Yes, sir. Let me see,—I saw Mr. Heckman again,—I saw Mr. Heckman once more after that before I saw Mustard, and I was talking with him about going up to the springs,—the doctor said something about that. "Well," he says, "I guess we cannot do any more for you," he says; and the clerk told me he said he wouldn't pay any longer for the room. "Well," I said, "all, right; I will pay for the room then—I will have to see another doctor"—and Mr. Heckman told me the same thing, that he wouldn't do it, but he said, "We will send you down home if you want to go down home, if you will sign up"—

Q. He said if you would sign up he would send you down home? A. Yes.

Q. Down below? A. Yes.

Q. Did he say what he wanted you to sign up?

A. He just said, "If you will sign up with the company,"—give me to understand if I would sign that I wouldn't come back on the company they would send me home.

(Testimony of David J. Gover.)

Q. Pay your way down below? A. Yes.

Q. After that did you go to see Dr. Mustard?

A. After that I went to see Dr. Mustard—right after that.

Q. Did he examine you? A. Yes, sir; he did.

Q. Did he tell you what was wrong with you?

A. Yes, sir; he told me my spine here was hurt—that I was hurt in the back, and he took and strapped me up clear from my hips up to here, and he said, “You keep that on for about three days, and come up and tell me how you are doing.” Well, it wasn’t—I think the next day I changed crutches,—those crutches were a little too short, and when the doctor [28] straightened me up there I got those, which were about two inches longer than the others, and I went back then the third day, and Mr. Mustard taken off these straps. “Now,” he said, “you take a good hot bath and come back and we will see how you are.” At that time I told the doctor, “I am awful anxious to go home, Doctor, and I would like to go home.” He said, “Well, we will see”; and I went back up after I had taken this bath and he strapped me up again, and he says, “Now,” he says, “I think you can walk better.” Well, that braced me up, and I seen the Captain of the “Jefferson,”—he came into the hotel—and I said, “I would like to go home with you, Captain,”—I came up with the same man and I had seen him a time or two,—just spoke to him,—he was an awfully nice fellow—

Q. No need to go into all those details.

A. That is all right.

(Testimony of David J. Gover.)

Q. Did you go down below after that?

A. Yes, sir; I went down that day.

Q. Dr. Mustard, however, you stated, told you your spine was hurt? A. Yes, sir.

Q. When he examined you? A. Yes, sir.

Q. State whether or not in his examination he struck any portion of your spine that was very sensitive. A. Yes, sir; he did.

Q. And it was after that you straightened up, you say? A. Yes, sir; it helped me right here.

Q. It helped you and you got new crutches,—longer crutches?

A. Yes, sir;—with his fingers just pressing that way and he found—

Q. You stated that then you went below?

A. Yes, sir.

Q. Went to your home? A. Yes, sir. [29]

Q. Where is your home?

A. My home is at Cottage Grove, Oregon.

Q. You went down there?

A. Yes, sir; I went just right straight down.

Q. Did you have medical treatment down there?

A. Yes, sir.

Q. What did you discover was wrong with you?

A. Just about the same as Dr. Mustard,—the doctor told me, he said, “You are in a pretty bad fix”—

Mr. FAULKNER.—We object to what somebody told him down in Oregon.

Mr. ZIEGLER.—That isn't so much hearsay, your Honor,—it is what he discovered was wrong

(Testimony of David J. Gover.)

with him,—it is the only way a man can tell those things.

The COURT.—What he discovered would be one thing, and what somebody else told him would be another.

Mr. ZIEGLER.—About the only way an injured man can discover such thing is by consultation with his physician.

Mr. FAULKNER.—He has a physician here.

The COURT.—You could have taken the deposition of the physician.

Mr. ZIEGLER.—I can prove that by Dr. Mustard, but I wanted to ascertain what he found was wrong with him down below.

The COURT.—You cannot ask him that if it depends upon what somebody told him.

Q. You say you did have medical treatment down below, Mr. Gover? A. Yes, sir.

Q. How did you get along after you left here—any better?

A. No, I didn't get along any better.

Q. What was your condition?

A. My condition was just about the same as it was here.

Q. What was the matter with you down below?

A. My spine and my back and hips was in bad shape, and my legs were numb all the time.

Q. How were you internally,—were you all right inside? A. No, sir. [30]

Q. What was wrong with you?

A. I had to use an injection all the time,—I was

(Testimony of David J. Gover.)

just the same as I was here.

Q. State whether or not you have had to pursue that same method all the time.

A. Yes, sir; all the time since,—every time, gentlemen.

Q. How is your bladder?

A. My bladder is in very bad shape.

Q. What do you mean by very bad shape?

A. I mean I cannot hold my urine.

Q. Does that condition exist now? A. Yes, sir.

Q. Is it getting any better or worse?

A. Well, it is getting a little worse.

Q. Now, Mr. Gover, did you ever have any trouble of that nature before this injury?

A. No, sir; I did not.

Q. What was the condition of your health before this injury?

A. I thought it was the common average of all prospectors—sometimes would be a little bilious or have a headache, but otherwise I was what you might call pretty skookum.

Q. During the time you worked at Loring there did you lose any time on account of sickness?

A. I lost a day, I think, twice, that I was sick at my stomach—sick headache, and I lost a day.

Q. Did you ever have rheumatism before that time?

A. I never was bothered with rheumatism at all.

Q. When Dr. Ellis told you that you had rheumatism, did he tell you that they had informed him at

(Testimony of David J. Gover.)

the hatchery that you never fell out there and that you were just putting on?

A. No, sir; he never told me that.

Q. He did not? A. He did not.

Q. You stated they had a blacksmith-shop there at the hatchery? [31]

A. Yes, sir; they have a shop there.

Q. And an electric dynamo? A. Yes, sir.

Q. Boiler? A. Yes, sir.

Q. Sawmill machinery? A. Yes, sir.

Q. And those are the things with which they carried on that business, are they? A. Yes, sir.

Q. With machinery and mechanical appliances?

A. Yes, sir.

Q. I think you stated this wheel-house was a portion of the sawmill? A. Yes, sir.

Q. Part of the ways and works? A. Yes, sir.

Q. And you had nothing to do with this ladder, Mr. Gover, did you—with control of it or the inspection of it? A. No, sir.

Q. Or the construction of it? A. No, sir.

Q. Now, how much were you earning out there, Mr. Gover,—what pay were you getting?

A. \$3.85 a day and board.

Q. Which would make approximately \$5.00 a day?

A. Well, I suppose so.

Q. Allowing \$1.15 a day for board?

A. I suppose so—I don't know—that is what we were supposed to take,—that is what I was told before I went up that is what we would get.

Mr. ZIEGLER.—If the Court please, we offer

(Testimony of David J. Gover.)

this in evidence, this sketch, in connection with the plaintiff's testimony, to show the general situation there. [32]

Mr. FAULKNER.—No objection.

(Whereupon said sketch was received in evidence and marked Plaintiff's Exhibit "A.")

Q. Now, Mr. Gover, how have you been able to sleep since this injury?

A. I don't sleep good at all—just a little nap—I don't sleep—I am nervous.

Q. How has your appetite been?

A. I will tell you; it isn't very good, my appetite isn't.

Q. Do you eat regularly like you did before you were injured?

A. No, sir, I don't; I don't eat near as much as I did before I was injured—not a thing like it. My wife all the time is trying to coax me to eat something. I don't care to eat—have no appetite whatever to speak of.

Q. Mr. Gover, who sent you up that ladder?

A. Mr. Patching sent me up there.

Q. State whether or not in going up and down the ladder you used the same degree of care that you did about your other work.

A. Why, certainly, I did; I thought he wouldn't send me up there if the ladder wasn't all right, so I just went ahead.

Q. What did you say?

A. I said I thought he wouldn't send me any place that wasn't all right, and it looked all right, but I

(Testimony of David J. Gover.)

suppose a person with a mallet tapping it would have found out it was defective; but just looking at it you couldn't see it was defective. I supposed he had it examined, and all the things, and I just went about my work.

Q. The same as you did with your other work?

A. The same, and as careful as I did any other work,—I tried to be careful, but that pulled loose with me and down I come before I had any show to catch anything or do anything.

Mr. ZIEGLER.—That is all. [33]

Cross-examination.

(By Mr. FAULKNER.)

Q. When you were picked up, Mr. Gover, they took you to the bunkhouse? A. Yes, sir.

Q. And you saw the slat lying on the tramway?

A. I showed that to Mr. Orton.

Q. How far was the tramway from the ladder, about?

A. I should judge maybe—from 4 to 6 feet.

Q. From 4 to 6 feet?

A. Yes, sir,—something like that.

Q. That is from the foot of the ladder out to the tramway? A. Yes, sir; something like that.

Q. And this rung was lying on the tramway?

A. Yes, sir.

Q. And you observed the end of it was rotten?

A. I observed there was some rotten wood—three spikes,—I observed three spikes in each end, because I wondered how it happened to get loose the way it did.

(Testimony of David J. Gover.)

Q. Did you see the other end of the slat?

A. There was three spikes in each end, and one end of it I noticed some rotten wood between the spikes,—some short pieces of rotten wood.

Q. These three spikes were sticking out, were they? A. Yes, sir.

Q. They had been pulled out from the ladder?

A. Yes, sir, out of its place—it was morticed in.

Q. And you had your weight on that pulling it, did you?

A. No; I had this hand on that rung, and my right foot down about the fourth rung.

Q. The one that gave way was the top rung?

A. Yes, sir,—my right hand.

Q. And that was set in a groove in each end, was it, of the ladder? [34]

A. Just a little groove—there wasn't much of a groove—just a little set-in.

Q. It was fitted in, was it?

A. Oh, I should judge it might have been a half inch, or a little notch in there.

Q. When you fell you say you went out a distance of about 4 to 6 feet and hit the tramway?

A. I fell back. I had my right foot on this rung, understand, and of course when I fell I stiffened myself and I went out—I didn't go straight down—I couldn't go straight down, my feet didn't slip off, understand, but I had that foot on the rung, and when I fell I fell back, and I tried to get my head down between my shoulders that way.

Q. Your feet did not slip at all?

(Testimony of David J. Gover.)

A. This foot didn't slip until after I got out a ways.

Q. Now, Mr. Gover, you say that from where this incline on Plaintiff's Exhibit "A,"—you say the incline which you have marked C, the flume, or the boards coming down there started about 6 feet away from the ladder?

A. I wouldn't be positive where it started,—it started a little ways from that ladder.

Q. It was approximately 6 feet?

A. It might have been 4 or it might have been 6.

Q. It was some little distance away?

A. It was a little distance away from the ladder, yes, sir.

Q. Now, Mr. Gover, looking at this Plaintiff's Exhibit "A," facing this exhibit, you say there was staging or something on the side of this structure which you have marked here with the letter A, which came out not quite to the ladder—is that true?

A. Not quite to the ladder?

Q. Yes.

Mr. ZIEGLER.—I don't think he testified that way, Mr. Faulkner.

Mr. FAULKNER.—I may be mistaken. [35]

Mr. ZIEGLER.—I think you are.

Q. Did you notice anything on the side of this structure which you have marked A?

A. I saw there was something laying along there—I saw there was a little board laying along there, but, understand, I fell with my foot here which threw me outside.

(Testimony of David J. Gover.)

Q. You went out over that board? A. Yes, sir.

Q. Wait a minute—I want to get the position of that board, Mr. Gover,—about where was that?

A. I couldn't say, but I think—

Q. Approximately, I mean.

A. It might have been halfway down,—now, I am not sure.

Q. Six feet? A. It might have been.

Q. And it extended out across the face of the ladder? A. This way.

Q. Yes, out toward the letter C on this exhibit?

A. I am not sure about that, whether it did or did not,—yes, it may have done that, but I fell clear outside.

Q. You fell clear outside?

A. Yes, clear outside of that.

Q. That is the point—and you had a peavey, you say, up there? A. It was up in the flume?

Q. Where did you leave that peavey?

A. Where did I leave that peavey?

Q. Yes, when you fell.

A. You see, I loosened the top of the board and put my rope on, then I would go down on the platform below and loosen the bottom of the board and let it down; and the peavey was down there I think at that time.

Q. You don't know just where the peavey was?

A. I am not sure.

Q. You were using a peavey to pry off the boards?

[36]

A. Yes; because I couldn't reach them with the

(Testimony of David J. Gover.)

old axe,—any way to get them loose, see.

Q. What time did you begin this work of tearing down the structure, Mr. Gover?

A. It was in the afternoon.

Q. About what time,—did you begin right after lunch?

A. I am not sure whether I went there and worked a little on the fence, setting the posts and tamping them in, or whether I went right to work at that,—I am not positive about that, right after lunch.

Q. But you looked at your watch at a quarter to four?

A. Yes, it was about that time, along after I had worked there, and I was trying to get those boards down before quitting time. I had fixed the lower part and piled it up as Mr. Patching said, which I think they will admit, and then that was the last thing I was doing, was getting those boards down, and I think that is about the time; yes, sir.

Q. And your watch stopped at a quarter after four?

A. About that time, if I remember right,—it was a little after four, anyhow, and I will tell you how I know about it being broke. It was running all right, and after I was hurt I asked Mr. Orton to see what was the matter with my watch—it wouldn't run, and he said the hair spring was broke.

Q. The watch was in your pocket? A. Yes, sir.

Q. On which side did you strike the ground when you fell? A. I fell right on my back here.

Q. Right on your back? A. Yes.

(Testimony of David J. Gover.)

Q. You fell clear back, backwards?

A. Fell backwards.

Q. And landed on your back?

A. Right across my hips here.

Q. Now, did you have any bruises? [37]

A. There was a green spot down,—I wouldn't wonder you could trace down the backbone there now and find it—a green spot, but no cut.

Q. No black and blue marks?

A. It was a little blue—I guess there was some blue spots on my soft places.

Q. It wasn't cut in any way?

A. No, it wasn't cut,—you see, I had on pretty considerable clothes.

Q. You allege in your complaint here that you fell on your hip and right side?

A. Right across here I fell. Hit a little harder right up along here than I did on this side.

Q. And you allege that you fell and struck your left hip, side and shoulder. Is that correct, or did you fall squarely on your back?

A. Well, from the way, the best I can remember, I struck right on there, a little more on the left side than on the right side, see,—a little more on there, and probably quite a bit more,—that side must have hit on the tram.

Q. It didn't break your arm?

A. No, it didn't break my arm.

Q. Or your leg?

A. Didn't break any bones.

Q. Didn't break any bones at all? A. No, sir.

(Testimony of David J. Gover.)

Q. And you observed no cuts—no abrasions of the skin? A. No, no cuts.

Q. And you didn't see any bruises?

A. Oh, yes; there was bruises.

Q. Where?

A. There was bruises on my hip there. I remember taking the clothes off, and there was bruises a long time afterwards on my back. [38]

Q. It took some investigation to discover any bruises? A. Not very much.

Q. Now, was Mr. Patching up on the flume there before you commenced to work? A. That day?

Q. Yes.

A. I didn't see him.

Q. Didn't you see him there at all?

A. No, sir, I didn't see him.

Q. And this flume, you say, that you were dismantling was connected with the sawmill?

A. Yes, sir.

Q. What do you mean by that, Mr. Gover? How do you mean it was connected with the sawmill?

A. Well, connected with the business of the sawmill.

Q. In what way? A. In carrying water.

Q. As a matter of fact, it wasn't being used at all, was it? A. It had been after I went there.

Q. It wasn't being used at that time?

A. Right then at that time; no.

Q. It was being torn down, wasn't it?

A. Just that part of it—that is the first part I seen torn down.

(Testimony of David J. Gover.)

Q. Do you know where it is now?

A. I don't know anything about it.

Mr. ZIEGLER.—I object to that, if the Court please, as being immaterial, where it is now.

Q. In what way, then, was this structure you were tearing down connected with the sawmill, Mr. Gover?

A. Part of the flume.

Q. Part of the flume, but how was it connected with the sawmill? It was part of a flume, we know that, but in what way was it connected with the sawmill? What did it have to do with the sawmill?

A. This wheel-house—this flume had furnished water for them— [39] I should judge that would be the explanation.

Q. At one time? A. Yes.

Q. Not at that time?

A. Not right at that time; no, sir.

Q. And the sawmill wasn't running, was it?

A. Not right at that time.

Q. And hadn't been for some time?

A. Not very long before that.

Q. What time did this accident happen to you?

A. In April—April 19th.

Q. How far is that hatchery from Loring—from the tide water? A. I should judge 7 or 8 miles.

Q. And it is operated and kept going in the winter, isn't it? A. I don't think so.

Q. You don't think so? A. No.

Q. It wasn't operated last winter?

A. No—I think it was operated last winter.

(Testimony of David J. Gover.)

Q. There is plenty of water there all the time, isn't there? A. Yes.

Q. Was there any water running in the flume at the time you were tearing it down?

A. Yes, sir, down in the lower flume there was.

Q. Nothing going over this grade? A. No, sir.

Q. And hadn't been for a long time, had there?

A. I don't remember just how long—quite a little while.

Q. Now, Mr. Gover, you said that you were taken into the bunkhouse and you remained there for some time? A. Yes, sir.

Q. Under the treatment of Mr. Patching and Mr. Orton and the other men there?

A. Well, Mr. Orton was pretty busy; but Mr. Archibald and old [40] Mr. Donnelly helped me quite a bit,—he rubbed my legs more than anyone, and my feet.

Q. Did you tell Mr. Patching you wanted to go down for treatment? A. Right then?

Q. Yes.

A. I don't think so, right then at that time, because I will tell you, I couldn't stand it to be moved.

Q. Did you tell him at any time that you wanted to go? A. Yes, sir.

Q. And then you went? A. Yes, sir.

Q. When you told him you wanted to go you went?

A. I told him I wanted to go to the doctor; yes, sir.

Q. And while you were there at Loring, and since

(Testimony of David J. Gover.)

then, you have had trouble with your bowels?

A. I did right then,—they know that.

Q. You had constipation?

A. They knew right then—they had to use a syringe on me.

Q. How long did they use that, Mr. Gover?

A. All the time—every few days.

Q. All the time you were at Loring?

A. Yes, sir, at the hatchery.

Q. I mean at the hatchery. A. Yes, sir.

Q. They used that all the time? A. Yes, sir.

Q. You were there how many weeks—about 6 weeks? A. I judge so.

Q. How was your appetite then?

A. Well, I will tell you, my appetite wasn't extra good.

Q. You have had trouble ever since then?

A. Yes, sir.

Q. Ever since you fell? A. Yes, sir. [41]

Q. And you have been lame? A. Yes, sir.

Q. You have been obliged to go on crutches all the time? A. Yes, sir, I am.

Q. Where did you get your first crutches, Mr. Gover? A. Mr. Patching gave them to me.

Q. What did you do with those?

A. I used them.

Q. No, after you were through with them?

A. I took them over to the store and told them to send them back to Mr. Patching.

Q. To the drug-store? A. No, sir.

Q. Which store? A. Mr. Heckman's, I think.

(Testimony of David J. Gover.)

Q. Then what did you do—did you have some other crutches?

A. I got another pair of crutches.

Q. How long after you got these before you sent the others back? A. A day or such a matter.

Q. And then you took the others to the store and sent them back?

A. The day I went away I sent them over there.

Q. When you came down from the hatchery to tide water there, Mr. Gover, how did you come,—what is the route?

A. Mr. Orton and another gentleman—I think his name was Farrell, or something—they helped me down. I used my crutches—came down with my crutches.

Q. I mean how is the route? Is it over the land or over the sea, or how?

A. We came on the tram car whenever there was a tram car, and came down in a boat—a little motor boat; and then they put me on the tram car and wheeled me there to the top of the hill, and I went down with my crutches.

Q. You walked down from there?

A. Yes, sir. [42]

Q. To the next lake?

A. Yes, sir; and took the boat from there down to the next tram and put me on a car there.

Q. At the next tram there was a hill, wasn't there?

A. A hill?

Q. Quite a steep hill there at the second tram—did you notice that?

(Testimony of David J. Gover.)

A. Didn't notice any hill at all,—oh, yes, there is a hill; yes.

Q. How did you go down the hill, Mr. Gover?

A. They took me down on the tram.

Q. They took you down the hill on the tram?

A. Yes.

Q. How did they keep the tram from running away with you? A. They held the brakes.

Q. On the steep hills on the second—

A. The second place,—you are talking about the second place?

Q. Yes, I am talking about the second road, from the hatchery down to the salt water.

A. Now, let us get this right. The first one, you understand, I walked down; the second one they took me down on the tram—they held the brakes, Mr. Orton did, and the other man got on in front of me.

Q. The steep hill you went down on the car.

A. Yes, sir. The boys went down ahead of me, and I said, “Did I keep you waiting very long, boys?” They said, “No, not very long.”

Q. They went down ahead of you?

A. Yes; and I went down the best I could.

Q. How long did you treat with Dr. Ellis before you went to see Dr. Mustard?

A. I am not sure—I could find out, but I am not sure.

Q. About how long was it—six weeks—five weeks?

A. Four or five weeks, I should think.

Q. How many times did you see him during that time? [43] A. I saw him several times.

(Testimony of David J. Gover.)

Q. Did you see him a good many times?

A. Yes; several times.

Q. You went to his office several times?

A. Yes; I went up to his office to get these treatments he was giving me,—it was awful hard work to do, I will tell you that.

Q. He came down to see you at the hotel, didn't he?

A. Yes, he came to the hotel once or twice; and then he was going to come down, and he didn't come, and I waited; and I used to go down to lunch about 9 or 10 o'clock; and then in the evening, along late in the afternoon—

Q. And you cannot walk now without the aid of crutches?

A. No, sir—I can't walk and I can't do anything.

Q. You are unable to do anything at all?

A. Yes, sir, I am.

Q. You have been giving a good deal of thought to this case, haven't you, Mr. Gover?

A. I have not.

Q. That never affected you in any way?

A. I don't know—the thinking, I really don't think it has, because I will tell you, in the first place, I didn't think anything about the case. I thought they would do about what was right, and I didn't worry about it—I was trying to get well.

Q. Did you ever have any conversation with Mr. Orton up at the hatchery before you were injured about compensation in case you should be hurt?

A. I don't remember.

(Testimony of David J. Gover.)

Q. You are quite sure of that?

A. I don't remember it.

Q. Did you, some few days before this fall from the ladder, ask Mr. Orton about compensation in case an employee up there were injured?

A. Why, no. [44]

Q. What is that? A. Why, no.

Q. You didn't do that? A. Why, no.

Q. Do you know a man by the name of Dilabaugh, at the hatchery?

A. I met a man by the name of Dilabaugh here.

Q. Do you contemplate trapping with Mr. Dilabaugh when this case is tried, out in the woods?

A. If I was able to go I would, and may I explain something right now?

Q. I just want an answer to the question, Mr. Gover.

A. If I was able to go; yes.

Q. Isn't it a fact that you are making arrangements now to go out trapping when this suit is over, with Mr. Dilabaugh? A. No, sir.

Q. Just this question—didn't you write Mr. Dilabaugh a letter and tell him you wanted to go out trapping when this case is over?

A. If I am able to go, and I am that way yet. My wife will tell you I want to go—I like to trap—I want to go out and trap, and I had a nephew coming here and I expected to go out with Mr. Dilabaugh if I was able—

Mr. ZIEGLER.—If the Court please, if there is any such letter as counsel has intimated, I would

(Testimony of David J. Gover.)

like to make a demand on him to see the letter.

Mr. FAULKNER.—I haven't got it.

Mr. ZIEGLER.—I wanted to find out if you had it.

The WITNESS.—It is hearsay.

Mr. FAULKNER.—It isn't hearsay if you say so, Mr. Gover. You say you don't remember the conversation with Mr. Orton about damages in case you should be injured? A. No, sir; I don't.

Q. Do you remember the first day you went to see Dr. Ellis after you came to Ketchikan? [45]

A. Do I remember?

Q. Do you remember the circumstances of your going to see Dr. Ellis?

A. Oh, yes; I remember.

Q. Did you have a conversation with Dr. Ellis about getting compensation for being injured, the first time you were in his office? A. I say no.

Q. You didn't have any such conversation?

A. Why, no; I wanted to get cured—that is what I went to him for.

Q. So you didn't discuss that with him?

A. Why no.

Q. Now, Mr. Gover, you say that this injury has caused you a good deal of trouble internally?

A. Yes.

Q. You have had trouble with your bladder and your bowels? A. Yes, sir.

Q. And your appetite? A. Yes, sir.

Q. And you cannot sleep very well?

A. No, sir.

(Testimony of David J. Gover.)

Q. And you had none of those troubles before?

A. Nothing to speak of.

Q. Isn't it a fact that you did have trouble with constipation before you—

A. Just like anyone else would—Mr. Orton or anybody, when they eat something which don't agree with them.

Q. Isn't it a fact that you told Mr. Patching before this fall that you were troubled with chronic constipation, and asked him if you could have some black figs? A. Black figs?

Q. Yes.

A. I told him I liked black figs and they were good to keep that off; and so they are. There are some things you eat, if you eat black figs you don't need anything else. We always take them when we go prospecting—my nephew and I. [46]

Q. You did tell him you would like to have some black figs?

A. I did tell him I would like to have some black figs, because there was hundreds of them there, and I told him I would like to have some.

Q. You think all of the troubles you are suffering from now came from this fall from this ladder?

A. It certainly did.

Q. Did you ever have any of those troubles before?

A. No, sir; let me tell you something,—

Q. That is all right—you just answer the questions—I don't want to get into an argument. You didn't have any of these troubles before, that you are suffering from now? A. No, sir.

(Testimony of David J. Gover.)

Q. Did you ever have any injury before that caused you any trouble? A. I had a broken leg.

Q. How did that occur?

A. A lumber pile fell against me.

Q. Isn't it a fact that you told Mr. Patching shortly after the 19th of April last that you had had, a very serious accident and had been all smashed up?

A. Why, no.

Q. You didn't tell him that?

A. I had my leg smashed.

Q. Do you know Mr. Carl Peterson?

A. I know Charley Peterson.

Q. From the hatchery? A. Yes, sir.

Q. Did you tell Mr. Peterson before this fall on the 19th of April that you had been badly smashed up in a runaway accident?

A. No; I never had a runaway.

Q. You didn't tell him that? A. No.

Q. You didn't talk to Mr. Peterson about an accident at all?

A. No; I never had no runaway. [47]

Q. Never had any accident?

A. Not no runaway—nothing but this leg.

Q. That was the only accident you ever had?

A. For 35 or 40 years.

Q. And you say you were prospecting, Mr. Gover, for somewheres around between 40 and 50 years?

A. In the '70's I commenced prospecting some—of course, I didn't follow it steady all the time—I worked at it a while—I was in the butcher business for a while.

(Testimony of David J. Gover.)

Q. You said you had been up and down this ladder a number of times before you fell?

A. I couldn't say just how many times that I had been up and down.

Q. You had been up and down there about six or seven times, hadn't you—something around there?

A. I don't think so,—I don't remember, but I don't think so.

Q. You are not sure about that?

A. Well, I don't think so,—I am not positive, don't think so, though.

Q. And you didn't tell Mr. Peterson that a horse ran away with you, and that you had had trouble—

A. No, sir, positively I did not.

Q. And you had not noticed any defect in the ladder? A. No, sir, I did not.

Q. The sawmill was not running? A. No, sir.

Q. Had not been running for some time?

A. I don't know just how long.

Q. This flume you were tearing down was an old structure, wasn't it, Mr. Gover,—been there for some time?

A. Yes, sir; been there for some time—I don't know how long.

Q. The water-wheel that was in the end of what you call the water-house was pretty old, wasn't it?

A. The wheel-house?

Q. Yes, the wheel-house. [48]

A. Well, I don't know when,—I didn't look at the wheel—I seen it in there.

Q. Hadn't been used for a long time?

(Testimony of David J. Gover.)

A. I couldn't tell you how long.

Q. You never saw it used?

A. No, I never saw it used.

Q. Now, when you came here to Ketchikan to see a doctor,—do you know whether or not the company has any doctor? A. The company?

Q. Yes. A. They sent me to Dr. Ellis.

Q. They sent you to Dr. Ellis? A. Yes, sir.

Q. They have no doctor, have they, of their own,—no regularly employed physician?

A. That is what he said he was.

Q. Do you know who paid Dr. Ellis?

A. The company.

Q. They paid your expenses here?

A. That is what they said they would do. Of course I paid my own expenses after he told me he wouldn't do anything more.

Q. Did Mr. Fred Heckman tell you that he would not do anything more for you? A. Yes, sir.

Q. When?

A. At the hotel there, he said, "We won't do any more"; and the clerk also said he said he wouldn't pay—

Q. Just a minute. What do you mean by not doing anything more,—anything in addition to what he was doing, or did he say he wouldn't continue what he was already doing? A. Going to quit.

Q. He said he was going to quit? A. Yes, sir.

Q. Going to stop right there? [49]

A. Yes, sir.

Q. Without any further treatment?

(Testimony of David J. Gover.)

A. Yes, sir.

Q. That is what he said?

A. That is what I recall.

Q. Do you recall his words?

A. He said, "If the doctor said it was all right, I would keep you here"; he said, "I have to go by what he says."

Q. He said he would keep you there?

A. Yes, sir, if the doctor said so.

Q. He didn't tell you he was going to discontinue the treatments?

A. Yes, sir, he did, because he said the doctor said there wasn't anything the matter with me.

Q. Oh, I see; he said he was going according to the doctor's recommendation?

A. Yes, sir; he said he had to go by that.

Q. That he wasn't going to do anything more for you. What was it he wanted you to sign?

A. I don't know. He said, "If we send you down home," he said, "if you will sign up, it is all right."

Q. Sign what,—the pay-roll, or what?

A. I guess so; I don't know.

Q. You did sign the pay-roll, didn't you?

A. Why, when I got a check I would sign.

Q. You signed it when you got your last wages from the company, didn't you?

A. Yes, I signed when I got the wages.

Q. Now, as a matter of fact, Mr. Heckman never told you he would not do anything more for you, did he?

A. He certainly did.

Q. Didn't he tell you in the hotel there that he was

(Testimony of David J. Gover.)

willing to do all he could for you,—tell you the company was willing to do whatever they could for you?

A. He said if the doctor said so they would. [50]

Q. He said the company would do all they could for you, didn't he? A. If the doctor said so.

Mr. FAULKNER.—That is all.

Redirect Examination.

(By Mr. ZIEGLER.)

Q. You say Mr. Heckman said that he would do something for you if the doctor said it would be all right?

A. Keep me there as long as the doctor said so.

Q. Did he tell you the doctor said that there was nothing wrong with you? A. Yes, sir.

Q. Did he tell them in the hotel that he would not pay for your room any more? A. Yes, sir.

Q. Did the clerk tell you that?

A. Yes, sir; and what is the man's name who has the hotel now—the head man?

Q. Ferris.

A. Yes, sir; Mr. Ferris told me twice; yes, sir.

Q. And Mr. Heckman did tell you if you would sign up that he would pay your way down below?

A. Yes, sir.

Q. Down home? A. Yes, sir.

Q. Pay your way out of the country?

A. He would pay my way down home, he said.

Q. If you would sign up? A. Yes, sir.

Q. Did you understand what he meant by signing up?

A. I thought I did,—he made it pretty plain.

(Testimony of David J. Gover.)

Q. What did you understand he meant?

A. If I would sign I wouldn't come back on the company in any way, he would send me out of the country.

Q. If you would sign a release for all damages against the company he would pay your way out?

[51] A. Yes, sir; he didn't say damages.

Q. That is what you understood? A. Yes, sir.

Q. With reference to that ladder, Mr. Gover, had you ever been up that ladder prior to that time?

A. I think one time.

Q. And on this day that you were injured, how many planks had you taken down the ladder?

A. Well, now, I couldn't say,—I couldn't say because I was hustling along to try to get the planks down. I think I must have had as many as three.

Q. What is your best estimate?

A. About three; I think maybe I was on the third one—I am not positive.

Q. You would not be positive? A. No, I ain't.

Q. Now, Mr. Faulkner has asked you about the various troubles you had before you were injured.

A. Yes, sir.

Q. Now, Mr. Gover, state the condition of your health generally before you were injured.

A. Well, now, I could say something like this: My nephew and me went up from Haines,—we went out into the Rainy Hollow country, and we prospected around there, and when we started in we had, I suppose, close to 50-pound packs—we had something like 45 or 50-pound packs, and he wanted to get in

(Testimony of David J. Gover.)

to get that boat that was coming,—there was a man came in the day before, Mr. Smith, and he said, “There is a boat coming in to-morrow,” and my nephew said, “I would like to go out on that”; and I said, “All right; I will go down and go back to Hyder”—I was aiming to go to Hyder, so we came in and the last part of that trip I walked 4 miles an hour and carried that pack. [52]

Q. Four miles an hour? A. Yes, sir.

Q. For how many miles?

A. From up there at Wells,—if you know where Haines is.

Q. How far was that up?

A. Anywhere from 16 to 20 miles—maybe a little over 20 miles.

Q. You walked that and carried your pack at the rate of four miles an hour? A. Yes, sir.

Q. Could you do those things right along at that time? A. Yes, I certainly could at that time.

Q. And that was about a year and a half ago, just shortly before you went to work at Loring?

A. It was in June.

Q. June of 1919? A. Yes, sir.

Q. That was not quite a year before you were hurt?

A. Yes, sir.

Q. You were accustomed to doing that kind of work, and could do it?

A. Yes, sir—I had been out in eastern Oregon.

Q. And your health at that time, and up to the time of the injury, was practically the same?

A. It was good. I felt good the day I was hurt.

(Testimony of David J. Gover.)

Q. Now, Mr. Faulkner asked you if you saw any bruises on your back and I don't recall what your answer was, but you couldn't see the bruises on your back very well, could you?

A. Only by using two glasses.

Q. By looking in the looking-glass?

A. Two glasses.

Q. And you noticed them there? A. Yes, sir.

Q. Is there a bruise or red spot right near the center of your spine at the present time?

A. I think so,—I haven't looked, but I think there is. [53]

Q. Now, with reference to this wheel-house, Mr. Gover, you say that wheel-house was used in connection with running the sawmill? A. Yes, sir.

Q. It wasn't in use at this particular time?

A. No, sir.

Q. But that had been its function? A. Yes, sir.

Q. A part of the sawmill?

A. That is the general supposition,—I don't know what else it would be for.

Q. Mr. Gover, your instructions were not to tear down any portion of this flume with the exception of the slant—what you call the over-shot?

A. That was all, and some extra top boards down to keep the water from splashing out, they wouldn't need any more. Mr. Patching said, "Take those off and make wood"—

Q. You were not instructed to take down any portion of the flume, were you, right above the ladder?

A. Oh, no.

(Testimony of David J. Gover.)

Q. Do you know whether or not that flume had been used while you were there, Mr. Gover?

A. I saw it being used.

Q. You saw it being used? A. Yes, sir.

Q. State whether or not you saw them hauling logs up along that tram about which Mr. Faulkner asked you. A. Yes, sir; I saw them hauling logs up.

Q. You saw them hauling logs up for the sawmill?

A. Yes, sir.

Q. How were the logs hauled up there?

A. By what you call a bull-wheel, I guess.

Q. They were hauled up by a bull-wheel?

A. Yes, sir. [54]

Q. Run by machinery to haul the logs up?

A. Yes, sir.

Mr. ZIEGLER.—That is all.

Recross-examination.

(By Mr. FAULKNER.)

Q. That was not running at the time you were injured, Mr. Gover? A. No, sir.

Q. Had not been for some time?

A. I don't know just how long,—they either used it a little before or a little while after I was injured. They were sawing up a big log on it there,—I think it was after.

Q. You think it was after? A. I think so.

Q. It had not been used that winter, as a matter of fact, had it—the sawmill?

A. I don't think it had.

Q. They don't use it in the winter, do they?

A. Oh, I think so, sometimes.

(Testimony of David J. Gover.)

Q. But it had not been used that winter?

A. Well, I am not positive,—when they want some lumber they saw it.

Q. All you ever saw in this flume was water?

A. Just water; yes, sir.

Q. You never did see the wheel running?

A. Oh, no; not that wheel, no, sir.

Mr. FAULKNER.—That is all.

Q. (By Mr. ZIEGLER.) That is what the flume was for, wasn't it, Mr. Gover, to carry water?

A. Yes, sir.

The COURT.—How old are you, Mr. Gover?

A. I am 69—I was born in '51.

Q. (By Mr. FAULKNER.) You were born in '51? A. '51.

Mr. FAULKNER.—That is all.

(Witness excused.) [55]

Testimony of Dr. John H. Mustard, for Plaintiff.

DOCTOR JOHN H. MUSTARD, introduced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ZIEGLER.)

Q. State your name, Doctor.

A. John H. Mustard.

Q. You are a practicing physician in Ketchikan?

A. Yes, sir.

Q. How long have you been a practicing physician?

A. Since 1901.

Q. From which school did you graduate?

(Testimony of Doctor John H. Mustard.)

A. Rush Medical College, Chicago.

Q. What has been the nature of your practice, Doctor?

A. I practiced—after I graduated from the Rush Medical College, I spent three and a half years in the hospital before I got out into private practice, where my practice would be of such a nature as you will find in general hospitals; later on I went to Nome, where I practiced—just such a practice as I have in Ketchikan, perhaps, except that possibly there were a larger percentage of accident cases.

Q. And you had some experience there with accidents? A. Yes, sir.

Q. Fractures, etc.?

A. Yes. I was in the army for nearly 20 months when discharged, and for some months before that had been inspector of the Base Hospital at Camp Lewis, Washington.

Q. And as such did you have any experience with fractures, breaks, and things like that?

A. Yes, sir, very much.

Q. Now, Doctor, do you know Mr. Gover?

A. Yes, sir.

Q. The old gentleman sitting there?

A. Yes, sir. [56]

Q. Do you recall when he first came to your office?

A. On or about the first of July of this year.

Q. Did you make an examination of his person at that time? A. Yes, sir.

Q. A thorough examination? A. Yes, sir.

Q. Did you make any notes of what you found?

(Testimony of Doctor John H. Mustard.)

A. Yes, sir.

Q. With reference to his condition? A. Yes, sir.

Q. Will you explain that to the jury, what you found?

A. At the time that I made the examination there was a reddish area, looking like a recent contusion, over what is known as the left sacral joint—that is right to the left of the spinal column on a level with the sacrum; there was a point of considerable tenderness on the spinal column between the 11th and 12th dorsal vertebrae. He complained of a great deal of pain in the back, and also in the legs. There was tenderness on pressure over the back and also the hips. The reflexes at that time were a trifle exaggerated—the reflexes in the lower extremity.

Q. That was during April?

A. That was during April; yes, sir.

Q. By the reflexes, what do you mean, Doctor?

A. For instance, supposing a man's leg is at rest, if you hit him on the knee at about this place the normal individual or leg will jump up like that. That is known as the patellar reflex, or the knee jerk. Other tendons or muscles at other points will respond similarly to a slight blow. In his case, at the time I examined him in July they were somewhat exaggerated—they responded more quickly than you would expect them to do in a normal individual.

Q. Did you examine him subsequent to that time?

A. Yes, sir; after he returned to Ketchikan in November he came [57] up to see me, along about

(Testimony of Doctor John H. Mustard.)

the middle of November, when I examined him again, and have since then.

Q. You have examined him since? A. Yes, sir.

Q. What do you find his condition is to-day, Doctor—at the present time?

A. At the present time that contusion, bruise, which I spoke of is still marked by a round brownish pigmented area the size of, perhaps, a dollar. The tenderness between the 11th and 12th dorsal vertebrae is still quite marked. The large muscles of the buttocks on the right side, the gluteus muscles are very, very much wasted, shrunken, destroyed, so that it does not require any medical—

Q. Is that apparent to the ordinary eye?

A. It is apparent to any ordinary eye.

Q. What could have caused that condition, Doctor?

A. Interference with the nerve supply of the muscle, interfering with its nutrition.

Q. Would the tenderness you discovered in the region of the spine indicate that there could have been an injury to the nerves in the spine that control that muscle?

A. Yes, sir; an injury to the spinal cord.

Q. What else do you find at the present time?

A. At the present time, from the lower portion of the lumbar region of the back, from that on down posteriorly there is altered sensation. The skin is sensitive to touch but it is insensitive to pain; it is also insensitive to differences in temperature. He couldn't tell whether an object that you touched him with is hot or cold. I could burn him in most of the

(Testimony of Doctor John H. Mustard.)

portions of that skin and he wouldn't know it.

Q. Have you made those tests? A. Yes, sir.

Q. Are you prepared to make them now?

A. Yes, sir. [58]

Q. If necessary? A. Yes, sir.

Q. What else did you find?

A. The reflexes which in July were exaggerated are now absent altogether. There is no knee reflex; there is no reflex of the tendon of Achilles, or the plantar reflex—you know how ticklish you are if somebody rubs you along the sole of the foot—that is entirely gone in both feet—no response to it at all. The penial reflex is absent.

Q. What would you say, Doctor, in your opinion, would be the cause of that condition to-day?

A. A lesion of the spinal cord producing degenerative changes in it.

Q. What would you say with reference to the prospects of improvement in that condition?

A. I consider them practically null.

Q. Practically no chance?

A. I do not think there is any chance myself.

Q. Now, Doctor, if the patient has no control over the bladder and the bowels, would an injury such as he has testified to, where he fell approximately 25 feet striking on his back, cause that condition—would it be possible to cause that condition?

A. There is a center in the spinal cord below, in the sacral region of the spinal cord, where the spinal cord control of the bladder and bowels is located, and an accident to that would cause very serious

(Testimony of Doctor John H. Mustard.)

conditions in the control of the bladder and bowel movements.

Q. Supposing a man had been in normal health and received an injury such as I have described, what, in your opinion, would be the cause of the condition of the bowels and bladder now?

A. In this case, an injury to the spinal cord.

Q. What would you say, Doctor, with reference to the permanency of this condition now? [59]

A. It looks to me as if it is permanent.

Q. The degenerative condition you have testified to you say is now permanent?

A. It looks that way to me.

Q. Now, I will ask you, Doctor, if any of the symptoms that you have detected in this patient would indicate that he was suffering with rheumatism?

A. The only symptom that would go with rheumatism would be the pain in the back, which he complains a great deal of. Of course that would go with rheumatism—with lumbago.

Q. That, however, would not affect the nerves—the degenerative condition of the nerves to which you have testified?

A. Oh, no; rheumatism would not produce degeneration of the nerves and muscles.

Q. Would you say, with reference to the reflexes, to which you have testified, that the patient was suffering from rheumatism?

A. The reflexes would be exaggerated if affected at all.

(Testimony of Doctor John H. Mustard.)

Q. The fact that the patient shows now no reflexes at all, what would be your opinion as to whether or not he was suffering with rheumatism?

A. It is not due to rheumatism.

Q. You are prepared to state that positively?

A. Yes, sir.

Q. And you stated that you are ready to make those tests to demonstrate the degenerative condition you have testified to? A. Yes, sir.

Q. You have made those tests? A. Yes, sir.

Q. When did you make them last?

A. Two days ago, I think.

Q. And you observed those things at that time?

A. Yes, sir; and at other times.

Mr. ZIEGLER.—That is all. [60]

Cross-examination.

(By Mr. FAULKNER.)

Q. Doctor, did you ever examine Mr. Gover before last July? A. No, sir.

Q. Never saw him before that?

A. I never saw him until—I have to qualify that. I had seen him on the street going around on crutches for some weeks before that, but I did not know who he was.

Q. Never made an examination of him?

A. No, sir.

Q. Now, Doctor, you spoke about a lesion of the spinal cord. Will you please explain to the jury fully what you mean?

A. Some altered—the word lesion would simply mean some condition altered from the normal condi-

(Testimony of Doctor John H. Mustard.)

tion in the spinal cord. We refer to it pathologically as a lesion—it simply means an abnormal pathological condition.

Q. Wouldn't a lesion of the spinal cord be caused by some injury at the point of the lesion, or near the point of the lesion? A. Not necessarily.

Q. Then I don't think the jury understands just what you mean by lesion. Does it mean an injury—if you hit a man in the eye and gave him a black eye, that would be a lesion of the eye?

A. The spinal cord is the largest nerve trunk in the body. It is composed—the great bulk of it is composed of nerve fibers, the nerve fiber being an essential—a very important element of the nerve cell. A nerve cell in one of the roots of the spinal cord will affect a nerve fiber clear down in any part of the extremity—down in the leg here. It is just similar to the telephone wires. The telephone wires come from all parts of the town, are united in a cable and then go on up to central in some place. The cable in this case might be represented as the spinal cord; the individual wires are the nerves that supply individual portions of the body. Now, if we have a cable with a hundred wires going through it, [61] suppose I separate one of those wires, the telephone at the other end of that wire is not going to ring—it is not going to act right; and that is just exactly what has happened in the spinal cord in this instance. The spinal cord has become injured, and some of these wires have become injured so that they are not

(Testimony of Doctor John H. Mustard.)

responding to the muscles that are supplied by these nerves—do not get the proper nutrition; as, for instance, the large muscle in the right buttocks is not getting nourished and it is shrinking away. The nerves which carry the sensation of heat and cold, differences in temperature, have been interfered with in this cable and the sensation does not come up to the brain and register it.

Q. The injury, if there was one in this class, was at the sacral lumbar joint, you say?

A. No, sir; I am glad you brought out this question because if I made myself understood that way I was misunderstood. The outward evidences of an injury at that time was this contusion over the sacral iliac joint. I would not say there were injuries any other place, or were not, but there were no outward evidences of any to the sight.

Q. Will you tell us what you call a contusion, Doctor? A. A bruise.

Q. Could you tell how long it had been there?

A. Oh, it was a matter of some weeks when he came to me first.

Q. I say, could you tell by looking at the bruise itself—a man comes to you with a reddish brown spot such as you have described—could you tell just about when that was inflicted?

A. You could tell pretty well, approximately.

Q. The spinal cord is pretty well protected, isn't it, Doctor? A. Yes, sir.

Q. It is protected by what?

(Testimony of Doctor John H. Mustard.)

A. By the bony canal known as the vertebrae, and the spine.

Q. The spinous process?

A. Yes—it is enclosed in a bony case, which we call the spine; [62] in addition to that it is also enclosed with coverings, with a layer of flesh in between.

Q. In fact, it is very well protected?

A. It is; yes, sir.

Q. In any injury to the spinal cord by an external force you would have to apply considerable force, wouldn't you, Doctor?

A. There would have to be a considerable amount of force; yes.

Q. And in applying sufficient force to injure the spinal cord what would be likely to happen to the bones and the protections of the cord?

A. There might be nothing.

Q. There might be nothing?

A. There might be nothing.

Q. Wouldn't it, as a matter of fact, be almost impossible to inflict very much of an injury to the spinal cord without injuring or breaking some bone?

A. Oh, no; the history of accident doesn't show that at all.

Q. You could injure the cord without hurting the bones at all? A. Yes, sir.

Q. Now, Doctor, if a man falls a distance of 20 or 25 feet, falls on his back and left hip, what would be likely to happen to him?

A. Well, he would be pretty severely shocked, I

(Testimony of Doctor John H. Mustard.)

would imagine—I would not care to demonstrate it.

Q. Would it be possible for a man to get a fall of that kind—not only fall down 25 feet but be thrown out about 4 feet, and fall, striking a tram-way, without breaking some bone?

A. There are very curious things that will happen.

Q. I mean, if he falls on his side and back, would it be possible he could fall that distance without breaking a bone—a man 69 years old?

A. After seeing many accidents, I think there is no telling.

Q. You think they could fall and not break a bone?

A. I took care of a man who fell 12 stories one time. [63]

Q. Did he fall on his side and back?

A. He fell on the pavement—that is what he fell on.

Q. You didn't see this man fall, did you?

A. No; but the policeman who brought him to me did.

Q. We are getting outside of the case. Wouldn't it be a very rare instance that a man would fall 20 or 25 feet, a man 69 years old—

Mr. ZIEGLER.—If the Court please, I am going to object to this question—it is not cross-examination.

The COURT.—I think it is. It is in direct line with the possibilities of the accident.

Q. Wouldn't it be a very rare instance where a

(Testimony of Doctor John H. Mustard.)

man 69 years old would fall that distance and in that position, on his hip and back, and not break something?

A. If I were betting I would bet the other way.

Q. Did you observe any fractures? A. No.

Q. In the sacral region? A. No.

Q. Or the vertebrae or any of the bones?

A. No, sir.

Q. Doctor, you spoke about lumbago—in what region of the back does the pain come, from lumbago?

A. In the so-called lumbar region of the back—that is where it comes; it affects the small of the back—the large muscles there become acutely or chronically inflamed.

Q. Has it anything to do with the iliosacral joint?

A. No.

Q. Lumbago? A. No.

Q. Nothing to do with that at all? A. No.

Q. Is it in that region?

A. The large muscles of the back go down and are attached to the [64] sacral bone—the upper edge or margin of the sacral bone.

Q. And the sacral bone and two or three other bones form what is called the pelvis, don't they?

A. Yes.

Q. Did you observe any injury to the pelvis in this man? A. No, sir.

Q. Now, Doctor, you have had a good deal of experience in damage suits, have you? A. Some.

Q. As a witness? A. Some.

(Testimony of Doctor John H. Mustard.)

Q. Now, you have had experience in cases where men complained of loss of sensation?

A. Yes, sir.

Q. And told you they had lost their sensations?

A. Yes, sir.

Q. Would you say it is not possible to feign that to some extent?

A. Evidently it is possible—I have known cases that feigned it.

Q. And particularly in cases where there was a lawsuit pending—does that sometimes happen?

A. Sometimes. I believe the literature is somewhat clouded with cases like that.

Q. Now, Doctor, I am going back to ask you this question: If a man has complaints such as Gover told you of, and has a lawsuit in contemplation or pending, wouldn't it be possible for him to get into a mental attitude which would make him, to some extent, at least, have those complaints—just simply from the mental attitude?

A. Answering yes or no, the mental attitude might have something to do with it, certainly.

Q. Will you explain to the jury, Doctor, the meaning of the word "psychosis," briefly?

A. In an abnormal mental state.

Q. Have you ever heard of an affection called litigation psychosis? [65]

A. I presume there might be such a thing.

Q. What would that be, Doctor?

A. I don't know whether that would be a mania

(Testimony of Doctor John H. Mustard.)

for litigation, or just a predilection in favor of litigation.

Q. Wouldn't it be a condition that was aggravated, or a mental condition produced by having become engaged in a suit for damages? A. Yes.

Mr. FAULKNER.—That is all.

Redirect Examination.

(By Mr. ZIEGLER.)

Q. Now, Mr. Faulkner has asked you a lot of technical questions. From your observation of this patient what would you say with reference to his condition now, whether he is feigning that condition or whether he is sincere?

A. There is absolutely no feigning in this case at all.

Q. You are positive of that?

A. I can demonstrate it.

Q. Will you come down here and demonstrate what you mean by the absence of the reflexes of the patient? A. Yes, sir.

Mr. FAULKNER.—I do not think that is necessary, if the Court please.

Mr. ZIEGLER.—Well, now, if the Court please, there is a lot of talk here about feigning this condition and the other condition, and I think it is only fair to the jury that this demonstration be made.

The COURT.—Mr. Ziegler, counsel has not accused your patient of feigning anything.

Mr. ZIEGLER.—I understand that, if the Court please, but by inference and insinuation, at least, he has.

(Testimony of Doctor John H. Mustard.)

The COURT.—When, from the witness-stand, he puts in any testimony that your client is feigning, then is the time to rebut it.

Mr. ZIEGLER.—All right, your Honor—with that understanding we won't insist on a demonstration. [66]

Q. Now, Doctor, a man falling this distance of 25 feet, if he struck on his back, or on the most fleshy part back here, there would not likely be any fractures of the bone—this is what I am getting at, he could fall without getting a fracture, or he could fall and might have several fractures?

A. Yes, sir.

Q. Especially if he fell on the buttocks?

A. That is where the padding is heaviest; yes.

Mr. ZIEGLER.—That is all.

(Witness excused.)

Mr. ZIEGLER.—That is our case, your Honor.

Mr. FAULKNER.—I want to make a motion, if the Court please.

Mr. ZIEGLER.—I think the jury, then, should be excused, your Honor.

(Whereupon the jury retired from the courtroom.)

Mr. FAULKNER.—If the Court please, the defendant now moves the Court to dismiss this case and grant a nonsuit, for the reason that the plaintiff has not established that the defendant was in any particular negligent, or that the accident, if any accident occurred, occurred through any act of the defendant that would make it liable in any degree

(Testimony of Doctor John H. Mustard.)

to him for damages. The action is brought under the Employer's Liability Act; the complainant states a cause of action under that act, which, as the Court knows, provides for the payment of compensation to employees who are injured by means of any defect in the machinery, appliances and works of any employer who is carrying on business by those means.

(Whereupon, after argument by counsel, the motion was, by the Court, taken under advisement, and court adjourned until 10 o'clock of the following morning.)

MORNING SESSION.

December 3, 1920, 10 A. M.

(The jury is present in the jury-box.)

Mr. ZIEGLER.—If the Court please, I would like to withdraw my rest and recall Mr. Gover for a few questions.

The COURT.—Very well. [67]

Testimony of David J. Gover, in His Own Behalf (Recalled).

DAVID J. GOVER, the plaintiff herein, upon being recalled as a witness in his own behalf, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. ZIEGLER.)

Q. Now, Mr. Gover, had the defendant, its superintendent and foreman, exercised ordinary and reasonable care in making a thorough and careful inspection of the ladder from which you fell, and had

(Testimony of David J. Gover.)

such inspection been made prior to the time you were injured, could the defect in said ladder, which caused you to fall, have been discovered?

Mr. FAULKNER.—I object to that as calling for a conclusion.

The COURT.—I think it does call for a conclusion. Let him describe the details—it is for the jury to say.

Mr. ZIEGLER.—All right, your Honor.

Q. Mr. Gover, did the defendant make an inspection of this ladder before you fell? A. No, sir.

Q. In your opinion how old was the ladder from which you fell? A. About 20 years.

Q. Did you know the age of the ladder when you went to work there? A. No, sir.

Q. You didn't know the age of it?

A. I didn't; no, sir.

Q. Now, what kind of lumber was this ladder constructed of? A. Native lumber.

Q. That is, Alaska lumber? A. Yes, sir.

Q. Now, assuming that the ladder from which you fell had been standing there exposed to the elements for approximately 20 years, state whether or not decay would likely set in.

Mr. FAULKNER.—I object to that as incompetent, irrelevant and immaterial, and the witness is not qualified to answer.

The COURT.—No foundation has been laid for the witness to answer that question. [68]

Q. Now, Mr. Gover, did the defendant know how old this ladder was? A. Yes, sir.

(Testimony of David J. Gover.)

Q. What kind of an examination of the ladder did you make when you went to work on it?

A. Just the usual examination like I would any other works.

Q. Did you think the ladder was safe at that time? A. Yes, sir.

Q. Why did you think it was safe?

A. Well, I didn't think the superintendent would send me up there unless he made an inspection.

Q. Now, Mr. Gover, describe that defect in the ladder as you later on saw the defect in the rung.

A. It was in the top of the upright, where it was nailed in—it was rotten in there.

Q. (By Mr. FAULKNER.) What was rotten?

A. Those uprights where the nails went through and held the cleat.

Q. (By Mr. FAULKNER.) What was rotten?

A. Those uprights.

Q. Now, Mr. Gover, I will ask you the question again—if the defendant and its foreman had exercised ordinary and reasonable care in causing a thorough and careful inspection to be made, could they have discovered that defect?

Mr. FAULKNER.—I object to that.

Mr. ZIEGLER.—On the authority of the case we submitted to your Honor, in the 206 Federal, I think that that question is competent. The same form of question was asked in that case.

The COURT.—In that case it does not appear to have been objected to by anybody. It does not appear, from an examination of that case, whether the

(Testimony of David J. Gover.)

witness was an expert or whether he was not an expert, but here the question is objected to.

Mr. ZIEGLER.—I want to raise the issue, if the Court please—I want to get that question before the jury, as to whether or not the defendant could have detected this had they made an inspection. That is the only way we can prove negligence on the part of the defendant. [69]

The COURT.—If that is your idea, have the man describe the defect, which he has done, and then put somebody on the stand who knows something about wood. It may be that this man can qualify—I do not know anything about that—but he has not qualified yet.

Q. Mr. Gover, you have had—

Mr. FAULKNER.—Now, just a minute. I object to the leading questions.

Q. State whether or not you have had some experience with timber. A. Well, some; yes.

Q. Do you think you would be able to tell whether a piece of timber—whether a defect of that kind in a piece of timber could be discovered by a proper and special examination? A. Yes, sir.

Q. Now, then, I will repeat the question. Had the defendant made a special examination of this ladder, and exercised ordinary and reasonable care, could they have discovered the defect in the ladder?

A. Yes, sir.

Mr. FAULKNER.—I object to the question on the same ground—the witness is not qualified.

The COURT.—The use of the words “ordinary

(Testimony of David J. Gover.)
and reasonable care'' makes that question objectionable.

Mr. ZIEGLER.—I will leave that out and make it a special examination.

The COURT.—Now, repeat your question.

Q. Mr. Gover, had the defendant in this case, its superintendent or foreman, made a special examination of this ladder, or caused an inspection to be made, could they have discovered this defect?

A. Yes, sir.

Mr. FAULKNER.—I object to that question. The witness has already testified that he fell from this ladder a distance of 25 feet [70] and that he has never been able to walk since; and now he is testifying about some defect that was 25 feet up.

The COURT.—That would go to the weight of the evidence. What are you basing your question on?

Mr. ZIEGLER.—I am basing it on what he has partially observed since that time.

The COURT.—Since that time?

Mr. ZIEGLER.—Yes, your Honor. I will ask him this question.

Q. Did you see this ladder any time after you were injured? A. Yes, sir.

Q. How long afterwards?

A. Well, just as soon as I was able to go out on my crutches.

Q. About how long would that be?

A. Probably a month,—four weeks or a month.

Q. Might have been, then, two, three, or four months? A. Yes.

(Testimony of David J. Gover.)

The COURT.—After the accident?

Mr. ZIEGLER.—After the accident, your Honor.

The COURT.—Let him describe what he saw then.

Q. What did you see then?

A. I saw that the top was rotten.

Q. You saw that the top was decayed?

A. Yes, sir.

Q. Now, I will repeat the question,—if the defendant in this case, its superintendent or foreman, had made a special examination of this ladder, or caused an inspection to be made, could they have discovered this defect?

Mr. FAULKNER.—The same objection,—the witness is not qualified—no foundation laid.

The COURT.—I think his testimony is admissible. The weight of it, of course, depends on what you can make out of it on cross-examination,—what he knows. It is admissible for what it is worth.

Mr. ZIEGLER.—Answer the question, Mr. Gover.
[71]

The WITNESS.—What is the question, please?

Q. Had the defendant, its superintendent and foreman, made a special examination of this ladder prior to the time you fell, and caused it to be inspected, could they have discovered this defect in the ladder?

A. Yes, sir.

Q. They could? A. Yes, sir.

Q. Now, Mr. Gover, you stated at the time you were directed to go up the ladder you did not know the age of the ladder—is that correct?

A. That is correct—I did not.

(Testimony of David J. Gover.)

Q. Did the superintendent at that time tell you the age of that ladder? A. No, sir.

Q. He did not tell you? A. No, sir.

Q. Now, you have stated you have had some experience with timber during your life?

A. Yes, sir.

Q. Are you in a position to state whether or not native spruce, standing for 20 years exposed to the elements, would be likely to decay?

Mr. FAULKNER.—Same objection.

Mr. ZIEGLER.—I am not asking the question. I am asking if he is in a position to state that.

Q. Could you state whether it would be likely to decay? A. Yes, sir.

Q. Well, now, what would your answer be?

A. My answer would be, exposed to the weather, that it is not a timber that will stand the weather like some other timber—like oak.

Q. State whether or not it would be likely to decay at the end of 20 years. [72]

A. Yes, sir; it would.

Q. Or 15 years?

A. Yes, sir, it might in 15 years. It is not a long lived timber.

Mr. ZIEGLER.—You may cross-examine.

Cross-examination.

(By Mr. FAULKNER.)

Q. Mr. Gover, you said you didn't know the age of that ladder when you went there? A. No, sir.

Q. How do you know now how old it is?

A. I found out afterwards.

(Testimony of David J. Gover.)

Q. How did you find out?

A. Oh, by several people—they said it was old.

Q. Who was it told you it was 20 years old?

A. Well, I think that was the general talk.

Q. Now, who talked that—who said that? Who said that ladder was 20 years old?

A. I think Mr. Peterson did.

Q. You think Mr. Peterson said it was 20 years old? A. Yes, sir; he was there a long time.

Q. As a matter of fact, you know pretty well that the hatchery hasn't been there 20 years, don't you?

A. No.

Q. You don't know that? A. No, sir.

Q. You think it has been there 20 years?

A. I think so.

Q. You think the ladder had been there 20 years?

Mr. ZIEGLER.—He didn't say the ladder had been there 20 years—he said the timber was 20 years old.

Q. How do you know the timber was 20 years old?

A. Well, just from experience.

Q. You say Peterson told you it was 20 years old?

A. About that old. [73]

Q. When did he tell you that?

A. After I was hurt.

Q. That is Mr. Charles Peterson?

A. Carl Peterson.

Q. He said that timber was 20 years old?

A. He said that was 20 years old, that building.

Q. Where was it that he told you that?

A. In the bunkhouse.

(Testimony of David J. Gover.)

Q. At the hatchery? A. Yes.

Q. Now, Mr. Gover, you say that you were out there after you were hurt? A. Yes, sir.

Q. You went back out to the ladder again?

A. Yes, sir.

Q. When was that?

A. As I told you, it was when I was out on my crutches—as soon as I could walk out on my crutches.

Q. Who was there with you? A. Nobody.

Q. Did you point that rotten place out to anybody?

A. Not that time I didn't, but at the time I was hurt I did.

Q. At the time you fell you pointed that cleat out to Mr. Orton? A. Yes, sir.

Q. Mr. Orton is here now? A. Yes, sir.

Q. You say the Alaska Packers or Mr. Patching did not make any inspection of the ladder,—how do you know that?

A. He would have found it if he had.

Q. That is the only knowledge you have of it, is it—of the fact that he did not make an inspection?

A. Couldn't have helped but have found it.

Q. You don't know anything about whether he made an inspection or not, do you? [74]

A. He didn't tell me.

Q. You don't know that?

A. I know he would have found it.

Q. That is simply a conclusion, Mr. Gover, as a matter of fact, in your own mind. You don't know anything about whether he made an inspection or not.

Mr. ZIEGLER.—He stated that he didn't see him

(Testimony of David J. Gover.)

make an inspection, but if he had he would have found the defect.

Q. Do you know anything about it, Mr. Gover, of your own knowledge,—of your own positive knowledge? Do you know anything about an inspection of the ladder? You can answer that yes or no,—you don't have to argue—just answer yes or no, what you know about it.

A. Yes, I know something about it.

Q. What is that? A. Yes.

Q. You know that he did not make an inspection?

A. Yes.

Q. How do you know that?

A. Because he would have found it if he had.

Q. That is the only way you know it?

A. That is one reason.

Q. You had been up and down that ladder seven times, hadn't you? A. I don't know.

Q. You don't know how many times you had been up there? A. No, sir.

Q. How many boards did you take at a time?

A. One board.

Q. Do you remember how many boards there were on the ground?

A. No, sir, I don't remember how many boards there were on the ground.

Q. If there were seven you were up and down seven times?

A. You understand I had taken some boards off that lower flume. I hadn't taken seven off of the upper flume, I don't think. [75]

(Testimony of David J. Gover.)

Q. This defect, you pointed it out to Mr. Orton, did you, in the ladder? A. Yes, sir.

Q. When was that, Mr. Gover? A. When I fell.

Q. I mean the ladder itself, when did you point that out? A. I pointed up to the ladder.

Q. You pointed up to the ladder? A. Yes, sir.

Q. At the same time you fell? A. Yes, sir.

Q. And you showed him the cleat?

A. Yes, sir, I did.

Mr. FAULKNER.—That is all.

Redirect Examination.

(By Mr. ZIEGLER.)

Q. Mr. Gover, you say that you took some boards off down below, from the platform?

A. Down on the lower flume.

Q. You didn't have to climb the ladder to get those boards off? A. No.

Q. So if there were 7 or 8 boards taken down that would not indicate that you had climbed the ladder 7 or 8 times, would it? A. No, sir.

Q. What is your best recollection as to how many times you went up the ladder, and down?

A. Well, I think I had three boards down—I am not positive.

Q. That is your best recollection?

A. Yes, three of those boards—I am not positive.

Q. Now, Mr. Faulkner asked you if you pointed out this rotten place in the upright to anyone?

A. Mr. Orton.

Q. When was that? A. After I fell. [76]

Q. Mr. Orton came there soon after you fell?

(Testimony of David J. Gover.)

A. Yes, sir.

Q. And the rung was lying on the log-way?

A. On the tramway; yes, sir.

Q. How did you happen to come to point that out to him?

A. He said, "How did you come to fall?" And I showed him—"That gave way," I said.

Q. Did you point out the place?

A. Yes, sir, I did; I told him to look up there. I said, "That gave way with me."

Mr. ZIEGLER.—That is all.

Recross-examination.

(By Mr. FAULKNER.)

Q. You said this to whom, Mr. Gover?

A. Mr. Orton.

Q. And who else—anyone else?

A. Mrs. Grant was there but I don't know whether she was right there at that time because she run to get Mr. Patching.

Q. Was Mr. Patching there?

A. He wasn't there,—he hadn't got there yet.

Mr. FAULKNER.—That is all.

(Witness excused.)

PLAINTIFF RESTS.

Mr. FAULKNER.—I renew the motion on the same ground that I made it on last.

(Whereupon court adjourned until 2 o'clock P. M.)

(Testimony of Fred Patching.)

AFTERNOON SESSION.

December 2, 1920, 2 P. M.

(Jury present in jury-box.)

The COURT.—I think the motion for a nonsuit in this case will have to be denied. I have had the testimony read and I find enough to save the case from a nonsuit.

Mr. FAULKNER.—We ask an exception, if the Court please. [77]

DEFENSE.

Testimony of Fred Patching, for Defendant.

FRED PATCHING, introduced as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Please state your name, Mr. Patching.

A. Fred Patching.

Q. What is your occupation?

A. Superintendent, Loring Hatchery.

Q. How long have you been in charge of the hatchery, Mr. Patching?

A. Since the 27th day of July, 1901.

Q. When was the hatchery constructed?

A. 1901.

Q. 19 years ago? A. Yes, sir.

Q. Were you superintendent there last April—1920? A. Yes, sir.

(Testimony of Fred Patching.)

Q. Do you know D. J. Gover, the plaintiff in this case? A. Yes, sir.

Q. How long have you known him, Mr. Patching?

A. He went to work there, I think, the 6th day of July, 1919, and that was my first acquaintance with Mr. Gover.

Q. How long did he remain there?

A. Until, I think, the 25th day of May, 1920.

Q. Now, Mr. Patching, what work is done at the hatchery? What is the nature of the business of the salmon hatchery?

A. Propagation of the salmon—hatching the eggs.

Q. Hatching salmon eggs? A. Yes, sir.

Q. How is that done? How are the eggs handled?

A. The fish are caught in the stream, the eggs taken from the fish and fertilized, and they are allowed to remain in the water not less than an hour; they are then carried into the [78] hatchery and placed in baskets in running water, and in eight days the bad eggs, the white eggs, are picked out; they then remain without being disturbed for about 30 or 40 days, according to the temperature of the water; they are then gone over by hand—that is, the white eggs are picked out,—the basket is raised and agitated so that the water from below boils the eggs up and exposes the white eggs to view, and they are picked out until they are all removed from the basket, when they are delivered back into the running water and left there for a period not to exceed a week?

Q. Is any of this work carried on by machinery?

A. No, sir.

(Testimony of Fred Patching.)

Q. Do you carry on any part of the work by machinery?

A. Construction of the buildings, repair—

Q. No, I mean the business of the hatchery.

A. No, sir.

Q. Have you a sawmill at the hatchery, Mr. Patching? A. Yes, sir.

Q. What kind of a sawmill is it?

A. A little sawmill run by water-power—single saw—small affair.

Q. Was that sawmill operated during last winter?

Mr. ZIEGLER.—Just a moment. If the Court please, I desire to object to that for the reason that it is immaterial whether it was operated last winter.

The COURT.—It may be—I cannot tell yet. If it is immaterial it does not hurt you,—I cannot tell yet.

Q. Was that sawmill operated during last winter, Mr. Patching? A. Not during the winter.

Q. Up until April 19, 1920? A. No, sir.

Q. Had not been operated at all?

A. No, sir, not during the winter.

Q. Was it in operation on April 19th?

A. No, sir.

Q. Was any machinery in operation at the plant?
[79] A. No, sir.

Mr. ZIEGLER.—The same objection, if the Court please.

The COURT.—The same ruling.

Q. Now, Mr. Patching, did you see D. J. Gover at the hatchery on the 19th of April, 1920?

(Testimony of Fred Patching.)

A. Yes, sir.

Q. What was he doing?

A. In the forenoon he was building a fence.

Q. What was he doing after lunch?

A. In the afternoon he was tearing down an old flume to get some wood to repair this fence.

Q. Tearing down an old flume? A. Yes, sir.

Q. Who instructed him to do that? A. I did.

Q. Now, Mr. Patching, how high was this flume from the ground? A. How high from the—

Q. How high was the top of the flume from the ground? A. The top?

Q. The top of the flume, yes.

A. Well, the top of the flume would be about 26 feet from the ground.

Q. Now, how was the top of the flume reached?

A. By a ladder.

Q. What kind of a ladder was it, Mr. Patching?

A. A vertical ladder.

Q. What was it made of?

A. The uprights were made of 2x6; the steps were made of 1x4, and the steps were notched in so that they were flush with the outside of the uprights, making them notched in one inch.

Q. That is, they would be set into the side one inch?

A. Yes; they were set into the side, and they were 24 inches long.

Q. What kind of wood was it?

A. Spruce. [80]

Q. How long had that been there on the 19th of April, 1920? A. About 8 years.

(Testimony of Fred Patching.)

Q. Now, did Mr. Grover go up on top of the flume?

A. He must have.

Q. By means of the ladder? A. Yes, sir.

Q. Did you go up that day? A. Yes, sir.

Q. Did you go clear up, from the bottom to the top? A. Yes, sir.

Q. Did you put your weight on the rungs of the ladder? A. Yes, sir.

Q. Had you ever been up there before April 19, 1920? A. Oh, many times.

Q. Did you observe any defect in the ladder at that time? A. No, sir.

Q. Have you examined the ladder since April 19, 1920? A. Yes, sir.

Mr. ZIEGLER.—I object to that, unless it is confined right near the time, as being too remote to have any bearing on the case—any examination after the accident.

Q. When was it, Mr. Patching?

A. I examined it the next day.

Q. The next day after April 19th? A. Yes, sir.

Q. Did you observe any defects in the ladder at that time? A. No, sir.

Q. And you say before Gover went up to attend to this work you had examined the ladder and gone up? A. I had gone up the ladder.

Q. Placed your weight on each rung?

A. Had to—that is the only way to get up.

Q. How much do you weigh, Mr. Patching?

A. About 220.

Q. Did you weigh that much at that time? [81]

(Testimony of Fred Patching.)

A. Probably a little more.

Q. Now, I will just ask you, Mr. Patching, if you have taken any photographs of that ladder?

A. Yes, sir.

Q. Have you a photograph here representing the ladder? A. Yes, sir.

Q. Now, when was that photograph taken, Mr. Patching—about when?

A. About a month or six weeks ago.

Q. Who took it? A. I took it.

Q. Now, I might ask you this, to go back to the work. When Mr. Gover was instructed to tear down this flume, what was he to do—what were your instructions to him?

A. On the end of the house—it wasn't a house—it was a heavy frame that supported an over-shot and wheel, and on the end of this, like here at the end of the house there was a chute run down to carry the waste water from the flume down into the tailrace below, and I went up to see where he could get the plank handiest to use in the construction of this fence. I told him to take down this chute that carried the water from the top down to the tailrace—the extra water the wheel wouldn't handle.

Q. Was there anything else he was to tear down?

A. No, sir; just to get those boards. We needed those boards to finish up the fence.

Q. Did he take down any boards out of the flume?

A. This was part of the flume.

Q. You have stated that you took this picture, Mr.

(Testimony of Fred Patching.)

Patching. What does that picture represent—represent the ladder?

A. That represents the ladder and the vertical side of this frame that the over-shot wheel was in.

Mr. FAULKNER.—I now offer that picture in evidence as Defendant's Exhibit No. 1.

Mr. ZIEGLER.—No objection, your Honor. [82]

(Whereupon said picture was received in evidence and marked Defendant's Exhibit No. 1.)

Mr. FAULKNER.—There is some writing on the back of this—I don't know whether it ought to be taken off or not. It is a label on the picture. Have you any objection to the writing?

Mr. ZIEGLER.—I never looked at it.

Mr. FAULKNER.—Just simply labels the picture—tells what it is.

Mr. ZIEGLER.—I think he has explained in his testimony. It is not necessary to have that on there. I don't think it will do any harm—leave it on.

Mr. FAULKNER.—All right.

Q. Now, Mr. Patching, I will ask you if you took any other pictures of the ladder that leads up to the top of that flume, at the same time that you took this?

A. I think I took four or five, possibly six the roll was, but I think there was five of them came out all right. One of them was no good.

Q. I hand you another picture and ask you if you took that, and what it represents?

A. This is the third view that I took, and it goes down a little more on the ladder.

(Testimony of Fred Patching.)

Mr. ZIEGLER.—Just a moment—I don't want any testimony concerning it until I have had a chance to examine it. May I ask the witness a question, your Honor?

The COURT.—Yes.

Q. (By Mr. ZIEGLER.) Does this show the entire ladder, Mr. Patching? A. No, sir.

Q. (By Mr. ZIEGLER.) It does not show the entire ladder?

A. No, sir; it is explained on the back of the picture.

Mr. ZIEGLER.—If the Court please, I do not think it is a picture showing all the surroundings, and I don't hardly think it is admissible.

The COURT.—It depends on what it is offered for. [83]

Mr. FAULKNER.—It is offered to show the bottom. The first picture showed the top and we couldn't get it all in one picture. We will introduce the measurements of the ladder so there will not be any question about that.

Mr. ZIEGLER.—I will withdraw any objection, your Honor.

Q. Now, what does that picture represent, Mr. Patching?

A. This represents the ladder. My camera was too small to get all the picture with one view, so I just took the camera and sloped it a little and took the bottom of the ladder. It is really part of this picture.

(Testimony of Fred Patching.)

Mr. ZIEGLER.—That is the first one that is introduced, isn't it?

Mr. FAULKNER.—That is the first one we introduced.

Mr. ZIEGLER.—I would like to ask another question. Mr. Patching, does this show the same condition existing at the time you took the picture that existed on the day that the plaintiff fell?

A. Outside of the ladder being a little older, it is the same condition.

Q. (By Mr. ZIEGLER.) There was no portion of the surrounding structure or timbers removed?

A. No, sir.

Mr. FAULKNER.—Now, I will offer that in evidence as Defendant's Exhibit No. 2.

Mr. ZIEGLER.—All right.

(Whereupon said picture was received in evidence and marked Defendant's Exhibit No. 2.)

Q. (By Mr. FAULKNER.) That shows the bottom of the ladder, you say, Mr. Patching?

A. It is more particularly the bottom and not as high as the top, so it shows the tramway there, which I couldn't get in the other picture.

Q. Now, you said you took some other pictures, Mr. Patching? A. Yes, sir.

Q. I hand you this picture and ask you if you took that? A. Yes, sir. [84]

Q. At the same time you took the picture of the ladder? A. Yes, sir.

Mr. ZIEGLER.—I would like to know if that

(Testimony of Fred Patching.)

shows the same condition as on the day the plaintiff claims he fell.

The WITNESS.—Yes, sir.

Mr. FAULKNER.—I introduce this as Defendant's Exhibit No. 3.

Mr. ZIEGLER.—No objection.

(Whereupon said picture was received in evidence and marked Defendant's Exhibit No. 3.)

Q. (By Mr. FAULKNER.) Now, Mr. Gover, in Defendant's Exhibit No. 3—is that taken from the same place—from the same angle as Defendant's Exhibits 1 and 2? A. No, sir.

Q. What does this Defendant's Exhibit No. 3 represent—what does it show?

A. This shows the end of the structure that contained the wheel, and the other pictures were the side view. The ladder was on the side, and you can see in this picture the end view, where the ladder is coming down, and shows the structure as it was, looking right at the end. The others were taken looking right at the face of the ladder.

Q. In other words, this is a side view of the ladder? A. Yes, sir.

Q. The others were face views? A. Yes, sir.

Q. In this Defendant's Exhibit No. 3, is the tramway mentioned by Mr. Gover shown?

A. Yes, sir.

Q. That is shown in this picture? A. Yes, sir.

Q. And the tramway shown in this picture is the tramway which he described as being at the bottom of the ladder, yesterday? A. Yes, sir.

(Testimony of Fred Patching.)

Q. Now, Mr. Patching, have you taken any measurements of that [85] ladder and the surrounding structures there? A. Yes, sir.

Q. In the first place, you heard Mr. Gover testify yesterday that there was a distance of about 6 feet, I think—from 4 to 6 feet, from the ladder to the end of the flume on the top?

A. I didn't understand that question.

Q. From where the ladder was fastened on the flume, he said there was a distance of from 4 to 6 feet to the end of that flume, where the boards slanted down.

A. There was a distance of about 20 inches.

Q. How long was the ladder, Mr. Patching, from the ground to the top of the flume?

A. Can I read from this?

Q. Yes.

A. Twenty-one feet.

Q. That is a memorandum that you made?

A. Yes, sir.

Q. From the ground to the top of the ladder—

A. From the ground to the top of the ladder?

Q. Yes.

The COURT.—To the top of the flume, you said.

Q. Top of the flume—from the ground to the top of the flume, how high is it?

A. About 23 feet—that is wrong—not from the ground to the top of the flume. From the ground to the top of the flume would be about 26 feet—from the ground to the top of the flume.

Q. What was situated at the bottom of the lad-

(Testimony of Fred Patching.)

der? A. A walk made of three pieces of 4x8.

Q. Where did that walk lead to?

A. To the tramway.

Q. How far was it from that walk, Mr. Patching, to the top of the ladder?

A. From the walk to the top of the ladder, 21 feet.
[86]

Q. How far was the tramway out from the bottom of the ladder? A. 7 feet and 2 inches.

Q. Now, in Defendant's Exhibit 1 there is a board that extends out—a loose end of a board that extends out from a platform across the face of the ladder; how far was that board from the ground, if you made any measurements?

A. That board is 10 feet from the ground—not from the ground—from the walk.

Q. How far from the top of the ladder to the platform? A. Eleven feet.

Q. Now, on Defendant's Exhibit 2, Mr. Patching, there is a brace that is shown coming down here, extending towards the tramway—how far is that out from the bottom of the ladder, that brace?

A. That brace is parallel with the tramway.

Q. That brace is parallel with the tramway?

A. Yes, sir.

Q. So that is, then, 7 feet?

A. No, it doesn't come quite to the tramway—5 foot—5 foot from the foot of the ladder.

Q. From the bottom of the ladder that is 5 feet. Now, Mr. Patching, after Mr. Gover commenced to work on the flume on the 19th of April, when was the

(Testimony of Fred Patching.)

next time that you saw him?

A. I don't know whether I went out while he was there working or not; I don't remember that, but if I didn't go out while he was working there, the next time I saw him was about half after four.

Q. Where was he then?

A. He was laying down under the tramway.

Q. Under the tramway? A. Yes, sir.

Q. Was he down below the walk that you said was at the bottom of the ladder?

A. That walk is 3 feet and 7 inches above the ground, and he [87] was lying on the ground under the tramway beyond the walk that came from the ladder to the tramway.

Q. Now, what was he doing, Mr. Patching—just lying on the ground there?

A. Lying there, and Mr. Orton was trying to get him out from under the tramway.

Q. What did you do with him, if anything?

A. Together we picked him up and put him up on the tramway and got upon the tramway ourselves, and took Dave and put him over on the log deck, which is connected with the mill, where we could set him down, and Orton went to get the car to take him to the bunkhouse.

Q. Did you take him to the bunkhouse?

A. Yes, sir; we placed him on the car, and the tramway runs down past the messhouse and the bunkhouse, and he walked into the bunkhouse.

Q. No, Mr. Patching, did you examine him at that time to ascertain whether there were any injuries?

(Testimony of Fred Patching.)

A. We took his clothes off.

Q. Did you make an examination of him?

A. We tried to find out what was the matter with him—if we could do anything to him.

Q. Did you examine to see whether he had any bruises or cuts? A. Yes, sir.

Q. Did you find any? A. No, sir.

Q. Did you find any fractures of any bones?

A. No, sir.

Q. How long did he remain at the hatchery after that, Mr. Patching? A. After the 19th of April?

Q. Yes.

A. I think until about the 25th or 26th of May.

Q. And at the time you found him did he complain to you that he had fallen?

Mr. ZIEGLER.—Just a moment—that is leading. [88]

The COURT.—What did he say about falling, if anything.

Q. (By Mr. FAULKNER.) What did he say, Mr. Patching?

A. What did Gover say about falling?

Q. Yes.

A. I said, “How is it you got hurt?” He said, “I fell from the ladder,” and he said, “I fell from the ladder and struck on my back.”

Q. Did he say where he struck?

A. On the tramway.

Q. And you found him down beneath the tramway?

A. Yes—he had then gone under the tramway.

(Testimony of Fred Patching.)

Q. The tramway was a distance of 7 feet 3 inches from the ladder? A. 7 feet 3 inches.

Q. You took him in the bunkhouse, Mr. Patching, and you say you discovered no bruises on him?

A. No, sir.

Q. Did you do anything for him during the time he was in the bunkhouse? A. Yes, sir.

Q. What sort of treatment did you give him, Mr. Patching? A. What is that?

Q. What did you do for him while he was there?

A. We rubbed him with liniment; and I have an electric lamp that I found very beneficial in bruises, and we put that light on where he complained of pain.

Q. And did he eat his meals there at the bunkhouse ?

A. He didn't eat very much the next day, but after that he picked up and ate.

Q. He ate well? A. Yes, sir.

Q. Did he complain of constipation?

A. Yes, sir.

Q. What did you do for him?

A. Gave him injections. [89]

Q. How many times did you do that—about how many times? A. From six to ten times.

Q. And after that did he have any trouble?

A. We gave him medicine and he was all right.

Q. He had no more trouble with his bowels?

A. No, sir.

Q. Before this injury—before this accident, or before this fall whatever it was, did Mr. Gover com-

(Testimony of Fred Patching.)

plain to you about having constipation?

A. Yes, sir.

Q. What did he say?

A. It was within a few days of the time that he came to work and he came to me and he said,—he asked if he could get some black figs. He says, “I use them and it takes the place of medicine, because I am troubled with constipation.”

Q. Did he say anything to you about coming to Ketchikan?—

Mr. ZIEGLER.—That is leading.

The COURT.—Yes, it is leading in one sense of the word, but it directs his attention to what part of the conversations, or of the thing he wants to bring out, but it is not suggesting to him what he should say in answer to the question.

Q. Did he discuss that with you, Mr. Patching?

The COURT.—What did he say.

Q. Was anything said between you and Gover about him coming to Ketchikan?

The COURT.—And if so, what was it?

A. I repeatedly asked him if he wished to go to Ketchikan.

Q. What did he say?

A. When I asked him the next day, “Why,” he says, “it is foolishness for you to think you can get me out to Ketchikan.” I said, “If you want to go to Ketchikan we will get you there.” Then some time later—oh, probably two weeks afterwards, he said he didn’t see what would be the use of going to

(Testimony of Fred Patching.)

Ketchikan—he thought he was doing as well there as it was possible to do anywhere. [90]

Q. Then you say he came to Ketchikan some time the latter part of May? A. Yes, sir.

Q. Now, Mr. Patching, at the time that Gover claimed to have fallen from this ladder, did you see the slat from the ladder? A. Yes, sir.

Q. That was broken off? A. Yes, sir.

Q. I might ask you this—do those pictures that you have introduced here, Defendant's Exhibits 1, 2 and 3, show the place where this slat came from?

A. Yes, sir.

Q. On the ladder? A. Yes, sir.

Q. And is the condition, in those pictures, of the ladder the same as it was on the 19th of April?

A. Practically—I don't suppose there would be much change in that time.

Q. Where did you find the rung of the ladder?

A. Laying on the tramway.

Q. That was how long after Gover was taken to the bunkhouse?

A. It was the same evening,—I couldn't say as to how long.

Q. Just explain to the jury, Mr. Patching, where that was found. If you will take this picture and point out to the jury where that rung was found—Defendant's Exhibit 3,—just step down here and point it out to them so they can see it.

A. This is the walk from the ladder over to the tramway—that gray-looking line—that is the walk that leads from the ladder over to the tramway; here

(Testimony of Fred Patching.)

is the ladder—you can see the rungs,—I found this rung about 10 or 12 feet from where this walk strikes the tramway.

Q. Now, Mr. Patching, I hand you here a rung and ask you if that is the rung of the ladder you picked up on the tramway after Gover was taken to the bunkhouse? [91]

Mr. ZIEGLER.—I would like to ask a question, your Honor, before he answers that.

The COURT.—Very well.

Q. (By Mr. ZIEGLER.) Mr. Patching, whose possession has that rung been in since the time you claim you found it? A. In mine.

Q. (By Mr. ZIEGLER.) Where did you have it? A. In my house.

Q. (By Mr. ZIEGLER.) You had it put away in your house? A. Yes, sir.

Q. (By Mr. ZIEGLER.) And when did you pick it up? A. The same evening.

Q. (By Mr. ZIEGLER.) The same evening, you picked the rung up? A. Yes.

Q. (By Mr. FAULKNER.) Now, Mr. Patching, I asked you if that is the rung that you picked up on the tramway? A. Yes, sir.

Q. You say you have had it in your possession ever since?

A. With the exception of from 10 o'clock this morning until 2 o'clock this afternoon, when I put it in the vault in the courthouse.

Q. And is that rung in the same condition that it was the day you picked it up?

(Testimony of Fred Patching.)

A. Except that it is a little older, that is all.

Q. I mean with reference to the nails and general conditions? A. Yes, sir.

Q. Has it been altered by anyone?

A. No, sir.

Q. Is there any difference in the condition of the nails?

A. These nails here, when I first picked it up you could see the wood that was sticking to it—little flakes of wood—they are still there but they are discolored with the rust,—it looked quite bright.

Q. Will you show the jury just the position that rung occupied [92] when it was on the ladder—when it was in place? Just show them up against the wall there.

A. The rungs in the ladder were set in,—the up-rights were 2x6, and these rungs were set in one inch so that the outside of the rungs was flush with the outside of the up and down piece—that was the main part of the ladder.

Q. Then the three nails that are now protruding through that rung on the right-hand side, they would be the nails on the right-hand upright of the ladder, would they? A. Yes, sir,—facing the ladder.

Q. And the nails that are broken off would be the nails on the left-hand side? A. Yes, sir.

Mr. FAULKNER.—I ask to introduce that as Defendant's Exhibit No. 4.

Mr. ZIEGLER.—No objection.

(Whereupon said rung was received in evidence and marked Defendant's Exhibit No. 4.)

(Testimony of Fred Patching.)

Q. Mr. Patching, have you had any experience in construction work, such as the construction of that flume and ladder, in Alaska? A. Yes, sir.

Q. How much experience have you had up there at the hatchery?

A. I had charge of all the work at the hatchery with the exception of two log houses that were built when I went there—or nearly built at the time I went there.

Q. Were you in charge of the work at the time this flume was constructed? A. Yes, sir.

Q. You are familiar with the different woods, are you? A. Yes, sir.

Q. Of Alaska, that are used in the construction of flumes and ladders? A. Yes, sir.

Q. And with the lasting qualities of the different grades of wood in structures of this nature?

A. Yes, sir. [93]

Q. In your opinion, Mr. Patching, from the experience you have had, how long would you say that a ladder of the nature of the one concerned in this case would last without decay?

A. It should be good for 10 years.

Q. Did you observe any decay about this ladder?

A. No, sir.

Q. Any place? A. No, sir.

Q. Did you examine the ladder after the 19th of April? A. Yes, sir.

Mr. ZIEGLER.—Just a minute. I object to that, if the Court please, unless it is confined to that time or close to that time.

(Testimony of Fred Patching.)

Q. How long after the 19th did you examine it?

A. On the 20th.

Q. Did you observe any decay or any defect in the ladder at that time? A. No, sir.

Q. And you said that you had been up on the ladder since that time? A. Yes, sir.

Q. I would like to ask you a question that I do not believe you understood, Mr. Patching, and that is the distance of the top of the ladder as shown in Defendant's Exhibit No. 1, from the end of the flume on top.

A. The distance from the top of the ladder to the end,—do you mean—

Q. Is there any space in between the top of the ladder and the end of the flume?

A. About 20 inches.

Q. Is there 20 inches shown in that picture?

A. Yes, there is 20 inches shown in the picture.

Q. And the boards that Mr. Gover was taking off slanted down from the end of the flume, as shown in this picture? A. Yes, sir.

Q. Defendant's Exhibit 1. [94] A. Yes, sir.

Q. Now, Mr. Patching, do you know how many trips Mr. Gover had made up and down that ladder before you found him under the tramway?

A. No, I don't.

Q. Have you any way of knowing, approximately?

Mr. ZIEGLER.—I object to this question. He says he don't know. Now counsel asks him if he has any way of knowing.

(Testimony of Fred Patching.)

Mr. FAULKNER.—Approximately the number—of course he didn't see him.

Mr. ZIEGLER.—I don't see how he is in a position to testify, your Honor,—that has no bearing on the case.

The COURT.—I think he may answer that.

Q. Is there any way by which you can tell, Mr. Patching?

A. That I could tell the exact number?

Q. About the number?

A. I have a way of getting the least number that he could have made.

Q. How many would that be? A. Seven.

Q. He made seven trips up and down. What is that based on, Mr. Patching—your knowledge?

A. The flume was 3 feet wide—3 2x12 formed the bottom of the flume; the sides of the flume were formed by two 2x12's, each side. Mr. Gover would knock one of these planks loose and lower it to the ground with a rope and go down and let it go, and go back up and let another one down with a rope—one plank at a time.

Q. That is the way you know he made at least seven trips? A. Yes, sir.

Q. Now, Mr. Patching, there is one more question I want to ask you about these pictures. I think Mr. Gover testified about this board that is shown in Defendant's Exhibit 1 that reaches [95] out across the face of the ladder there, and that you say was about midway of the ladder, or about 10 feet from the bottom. A. Yes, sir.

(Testimony of Fred Patching.)

Q. Was that board there on the 19th of April?

A. Yes, sir.

Q. Was it there before Gover commenced to work? A. Yes, sir.

Q. Was it there when he got through working?

A. Yes, sir.

Q. In the same position as shown in the picture?

A. Yes, sir.

Q. It wasn't disturbed? A. No, sir.

Q. You said you were present when Mr. Orton was there, and that you and Mr. Orton lifted Mr. Gover to the tramway? A. Yes, sir.

Q. After he complained of having fallen. Now, at that time did you hear Mr. Gover say anything to Mr. Orton about the slat or rung of the ladder that was lying on the tramway? A. No, sir.

Mr. FAULKNER.—That is all.

Cross-examination.

(By Mr. ZIEGLER.)

Q. Who was there first, Mr. Patching, you or Mr. Orton? A. Mr. Orton.

Q. Mr. Orton was there first? A. Yes, sir.

Q. So Mr. Gover could have said something to Mr. Orton before you arrived? A. Yes, sir.

Q. Just as he has testified to?

A. I don't know,—he had a chance to talk to him.

Q. When you went out there you asked Mr. Gover, "What is the matter there?" [96]

A. Yes, sir.

Q. And he told you he fell from the ladder, didn't he? A. Yes, sir.

(Testimony of Fred Patching.)

Q. Just the same way as he told here in the court-room, wasn't it? A. Practically.

Q. Practically the same? A. Yes, sir.

Q. No difference in his story at all?

A. No, sir.

Q. You didn't doubt it at that time?

A. I certainly did.

Q. You did at that time? A. Yes, sir.

Q. Why did you put him on the tramcar and help carry him into the bunkhouse there?

A. I necessarily would help the man all that I knew how.

Q. You were of the opinion that he did not fall and had not been injured, weren't you?

A. Not that distance.

Q. Did you think he had fallen at all?

A. I thought he had fallen from some place—probably slipped and fell, or something like that, but not from the top of the ladder.

Q. Right from that moment you were of the opinion that he never fell from the top of the ladder?

A. I couldn't understand how it was possible for him to have fallen from the top of the ladder.

Q. And as soon as he complained of being sick and injured, right away you got suspicious?

A. No, sir, there wasn't any suspicion in my mind,—I couldn't understand how he fell from the top of the ladder.

Q. Do you want to swear that he did not fall from the top of the ladder?

(Testimony of Fred Patching.)

A. I couldn't say that—I wasn't there to see him.
[97]

Q. You are not in a position now to say that Mr. Gover never fell from the ladder, are you?

A. From the top of the ladder?

Q. Yes. A. No, sir.

Q. You wouldn't swear that he did not?

A. No, sir.

Q. Now, Mr. Patching, you say the hatchery was built in 1901? A. Yes, sir.

Q. And when was this wheel-house constructed?

A. I am not certain as to that—probably about 14 or 15 years ago.

Q. About 14 or 15 years ago? A. Yes, sir.

Q. And it remained the same from that time up to the time of the injury? A. The wheel-house?

Q. The wheel-house.

A. You understand that what you are referring to as a house is not a house at all—it is a structure?

Q. Well, the structure, or whatever you want to call it.

A. It remained in practically the same condition.

Q. So on April 19th it was practically ready for dismantling, wasn't it?

A. We were dismantling it.

Q. It had served its purpose? A. Yes, sir.

Q. The ladder was built at the same time as the wheel-house? A. No, sir.

Q. Was the flume built at the same time the wheel-house was? A. Yes, sir.

Q. The flume was built at the same time?

(Testimony of Fred Patching.)

A. Yes, sir.

Q. How did you get up to the flume there?

A. Up the ladder.

Q. When did you tear that ladder out? [98]

A. Somewhere about 8 or 9 years ago.

Q. So that if it had been built 14 years ago, the ladder that you first tore down would have been about 5 or 6 years old, wouldn't it? A. Yes, sir.

Q. And you tore that down because it was no longer fit for use? A. Yes, sir.

Q. And this present ladder was there three years at least longer than the other ladder?

A. Something like that.

Q. Did you saw the timber up that was used in constructing this present ladder?

A. Personally?

Q. No, at the hatchery.

A. Yes, sir.

Q. When you built this second ladder was it built of brand new timber? A. Yes, sir.

Q. You are positive of that, Mr. Patching?

A. Yes, sir.

Q. How do you know that?

A. How do I know it was built of new timber?

Q. Yes, sir.

A. Because we had no old timber to build it of.

Q. You had no old timber to build the ladder of?

A. No, sir.

Q. Did you build ladders out there of old timbers sometimes? A. I don't think we ever did.

Q. You were using some of this old timber in the

(Testimony of Fred Patching.)

flume at this time for building a fence, weren't you? A. Yes, sir.

Q. You were using it for that purpose?

A. Yes, sir.

Q. And you are quite sure, Mr. Patching, that this ladder that [99] was constructed 8 years ago was constructed of brand new timber?

A. Yes, sir.

Q. You examined the place where this rung came from, didn't you? A. Yes, sir.

Q. And it was perfectly sound? A. Yes, sir.

Q. Just the same as that rung is? A. Yes, sir.

Q. You didn't bring the portion of that rung here— A. I brought the entire rung.

Q. I mean the uprights. A. No, sir.

Q. Were the uprights solid, too? A. Yes, sir.

Q. Perfectly solid? A. Yes, sir.

Q. You haven't got that upright here, have you?

A. No, sir.

Q. That portion from which the slat came?

A. No, sir.

Q. Why didn't you bring that?

A. I didn't think about it.

Q. You thought about bringing the rung, didn't you, Mr. Patching? A. Yes, sir.

Q. You knew at the time you brought that rung in that the plaintiff had claimed that the upright was also decayed, didn't you? A. Yes, sir.

Q. But you didn't see fit to bring that upright along?

A. I didn't think it was necessary,—I thought the

(Testimony of Fred Patching.)

rung would prove the condition of the ladder.

Q. The rung would prove the condition of the rung, Mr. Patching, but the rung would not prove the condition of the upright.

Mr. FAULKNER.—I object to those questions as argumentative, and [100] calling for a conclusion of the witness—what a rung proves or does not prove.

The COURT.—Yes—develop the facts.

Mr. ZIEGLER.—I don't care to pursue that line of cross-examination any further, your Honor.

Q. Mr. Patching, you are engaged over there in hatching out salmon fry? A. Yes, sir.

Q. And in order to do that you have troughs, tanks, etc., don't you, to keep them in?

A. Yes, sir.

Q. Use a considerable amount of timber?

A. Yes, sir.

Q. Lumber? A. Yes, sir.

Q. The lumber is sawed up in the mill there, isn't it? A. At the present time?

Q. No, it has been heretofore? A. Not all of it.

Q. A portion of it?

A. Nearly all of it. When we first started in there we didn't have a sawmill.

Q. Yes, but later on you got a sawmill, and practically all of the lumber was made from this sawmill?

A. Yes, sir.

Q. You also had a dynamo there furnishing lights?

A. Yes, sir.

Q. And a blacksmith-shop? A. Yes, sir.

(Testimony of Fred Patching.)

Q. And different kinds of mechanical appliances around there? A. I don't know what that means.

Q. Steam boilers and things like that?

A. We had a steam-heating boiler.

Q. Now, Mr. Patching, you stated you were up this ladder,—I [101] think you stated you were up this ladder, didn't you? A. Yes, sir.

Q. When were you up there?

A. Frequently for the last,—ever since the flume was built I have been up and down.

Q. When was the last time you were up there prior to the time Mr. Gover claims he was injured?

A. Prior to the time?

Q. Yes.

A. To that time?

Q. To that time.

A. I was up in the forenoon of that day.

Q. The flume wasn't being used then?

A. No, I think we turned the water out of the flume the August before. That was a portion of the old flume, and we built a new flume, and the old flume had not been used since,—Oh, I think we turned the water out in August, probably.

Q. You had been up there that morning?

A. I had been up there that morning.

Q. What did you go up there for?

A. To see where was the best chance to get some plank to fix the fence.

Q. And in going up there you told Mr. Faulkner you had put your hand on each rung in the ladder?

A. That wouldn't be correct because I wouldn't

(Testimony of Fred Patching.)

reach down to touch the bottom round with my hand.

Q. You mean all of the rungs from a reasonable height up to the top one? A. Yes.

Q. The top of the ladder is right close to the flume, isn't it?

A. The flume is on this structure that carries the over-shot wheel, and the top of the ladder is about 20 inches away from the side of the flume. The structure that held the over-shot wheel was some 6 feet wide, and the flume was in the center of this and the flume was made so it was 3 feet on the inside.
[102]

Q. Assuming this was the ladder and this was the top of the flume, the top of the ladder would be, you say, 20 inches from the top of the flume?

A. This ladder was below the top of the flume and even with the top of the structure that held the wheel; then the distance from a vertical line here back to the flume was about 20 inches, and the flume would probably be a foot or 15 inches above the top of the ladder.

Q. You could stand on the ladder and reach the flume all right? A. Yes.

Q. So in going up you would be as likely to place your hand on the flume, as you approached the top rung of the ladder, as you would to put it on the top rung of the ladder, wouldn't you?

A. After you come to the top rung of the ladder, yes.

Q. Are you willing to swear that you put your

(Testimony of Fred Patching.)

hand on the top rung of this ladder going up there that day? A. Yes, sir.

Q. You are sure of that? A. I am sure.

Q. How do you know you did, Mr. Patching?

A. There was no other place to take hold.

Q. Couldn't you take hold of the top of the flume?

A. No, sir.

Q. Could you take hold of the side of the ladder and take hold of the flume? A. No.

Q. It was only 20 inches away.

A. The ladder was nailed solid to this structure that held the wheel-house, and there was no way to get hold of it unless you would pinch it with your finger.

Q. What I mean, you had to get from the ladder to the flume to get on top of it, didn't you?

A. Yes, sir. [103]

Q. Did you have to stand on this top rung in order to get over to the flume? A. No, sir.

Q. You could get over with your feet lower down, couldn't you? A. Probably the next rung.

Q. So you don't mean to swear, Mr. Patching, that you put your hand on that rung, do you, that day?

A. Yes, sir.

Q. You are willing to swear to that?

A. I did swear.

Q. Absolutely? A. Absolutely.

Q. Now, how long prior to that day were you up there? A. I haven't the least notion.

Q. You haven't the least idea? A. No, sir.

Q. Can you give an estimate?

(Testimony of Fred Patching.)

A. No, sir; I couldn't give an estimate.

Q. You wouldn't have had any occasion to go up there, would you—the flume wasn't in use?

A. No, sir.

Q. It might have been quite a while.

A. It might have been quite a while.

Q. Now, I think you stated, Mr. Patching, that there was no defect in the ladder at all?

A. No defect.

Q. And if Mr. Gover says that this rung gave way as he was descending the ladder he is mistaken?

A. Yes, sir.

Q. Now, you stated that when you took Mr. Gover into the bunkhouse you couldn't see any bruise on him?

A. No, sir.

Q. You are not a doctor?

A. No, sir. [104]

Q. You couldn't tell at that time whether he had suffered an injury to his spine or to his internal organs, could you?

A. No, sir.

Q. Now, you say that Mr. Gover ate well after he was injured out there?

A. After the first day or so.

Q. He wasn't sick then at all?

A. He could eat.

Q. He could eat all right?

A. Yes.

Q. He could get up and walk around?

A. No, he couldn't get up and walk around for several days.

Q. For several days?

A. Yes.

Q. Are you sure that he got up and walked around after several days?

A. He told me he did.

Q. You didn't see him yourself?

(Testimony of Fred Patching.)

A. He showed me how he could get around, standing up without hanging on to anything.

Q. Just like any other well man?

A. No, he didn't act like a well man.

Q. He didn't act like a well man?

A. He didn't step out like a well man.

Q. You said something about him speaking to you about getting some black figs when he first came there? A. Yes, sir.

Q. There wasn't anything unusual about that, was there?

Mr. FAULKNER.—I object to this question as argumentative.

The COURT.—I think you are taking up unnecessary time, Mr. Ziegler. I think it is argument.

Q. Did you think anything more about this remark up to the time that Mr. Gover was injured?

A. What remark do you refer to, Mr. Ziegler?

[105]

Q. About wanting some figs.

Mr. FAULKNER.—Same objection.

The COURT.—What difference does it make whether or not he thought any more about it?

Mr. ZIEGLER.—I want to show it is a mere trifle, and insignificant.

The COURT.—Well, what is the use of wasting time on it?

Mr. ZIEGLER.—I want to get him to admit it, your Honor.

The COURT.—Ask him something else.

Q. You say after he was injured you told him if

(Testimony of Fred Patching.)

he wanted to go to Ketchikan you would take him to Ketchikan? A. Yes, sir.

Q. And he said at that time it was foolish—he could do as well there as he could in town?

A. You mean when I first spoke about it, or afterwards?

Q. Afterwards.

A. He said, “I am doing as well here as I can do any place.”

Q. You didn’t think at that time that he was feigning any injury, or getting ready to sue the company, did you? A. No, sir.

Q. He told you he thought he could do just as well there as he could if he came down to town?

A. Yes, sir.

Q. You didn’t know at that time whether Mr. Gover knew that he was seriously injured, did you?

A. I had no way of knowing what he knew.

Q. Now, Mr. Patching, you stated you picked this rung up the same evening? A. Yes, sir.

Q. Why did you pick the rung up?

A. Why did I pick it up?

Q. Yes, sir.

A. I saw it laying there and it looked strange to me that that rung should be laying where it was.

Q. And that is the reason you picked it up? [106]

A. Yes.

Q. What was the reason that you kept that rung?

A. Because I couldn’t understand how that rung could have come loose.

Q. That is the reason you intended to keep it?

(Testimony of Fred Patching.)

A. Yes.

Q. At that time there wasn't anything said about bringing any suit against the company, was there?

A. Not that I know of.

Q. And you just wanted to keep the rung because you wondered how it came loose?

A. My curiosity was excited to find out how that rung could possibly have come loose.

Q. And that is the reason you kept the rung?

A. Yes, sir.

Q. Not in anticipation of any suit Mr. Gover was going to bring? A. No, sir.

Q. Now, you say that you think he made about 7 trips up and down that ladder? A. Yes, sir.

Q. That is just your opinion? A. Yes, sir.

Q. You arrive at that opinion from the fact that there were seven pieces of timbers taken down?

A. Yes, sir.

Q. Wouldn't it have been possible for any of those timbers to have been dropped down?

A. I think if he had dropped them down he would have smashed them—they were water-soaked and very heavy.

Q. The only way that Mr. Gover could get up there to do that work was to go up that ladder, wasn't it, Mr. Patching? A. Yes, sir.

Q. Some of that timber was taken off from down on the platform, wasn't it?

A. Not on the platform, no. [107]

Q. Didn't he take some of it off without having to go up the ladder?

(Testimony of Fred Patching.)

A. Yes,—excuse me; you refer to this platform that was on the side of the wheel-house?

Q. I think so.

A. No; this was going away from that entirely, Mr. Ziegler.

Q. But he could take some timber down without going up the ladder? A. Yes, sir.

Mr. ZIEGLER.—That is all.

Redirect Examination.

(By Mr. FAULKNER.)

Q. Mr. Patching, how many employees were at the hatchery at the time that Gover claims to have fallen from the ladder, altogether?

A. I think about six. I have a memorandum with the number of men employed there, if you want that.

Q. No, that is all right.

A. About six.

Q. Now, Mr. Patching, if a man fell from that ladder the way it was situated—from the top of it—that is, having his hand on the top rung, and fell to the ground, where would he strike—fell to the bottom?

Mr. ZIEGLER.—I object to that because it is pretty hard to tell unless you see the man as he leaves the ladder.

The COURT.—Yes—that is argumentative, Mr. Faulkner.

Q. You say this walk extended from the bottom of the ladder out towards the tramway?

A. Yes, sir.

Q. What was the distance of that walk—

(Testimony of Fred Patching.)

A. You have it on the memorandum,—I think it was 7 feet 2 inches.

Q. That extended clear out to the—

A. Practically; there may be a little space of 2 or 3 inches between the end of the walk and the tramway.

Mr. FAULKNER.—That is all. [108]

Recross-examination.

(By Mr. ZIEGLER.)

Q. You said that before the ladder in controversy was built, the ladder that was there on the 19th of April, 1920, there had been another ladder up the side of the flume?

A. You mean where this ladder was?

Q. Yes. A. Yes, sir.

Q. You said that one was taken down?

A. Yes, sir.

Q. Why was that ladder taken down?

A. To make room for the sawed lumber ladder. When we first started there we made all of our ladders out of poles,—when we first started there we had no sawmill, and when we got the sawmill—it is only a small sawmill—we were using a large amount of lumber and lumber was very scarce, and we made all of our ladders out of poles; so after while, when he got more lumber, we made the ladders out of sawed lumber.

Q. And is that the reason the pole ladder was replaced by the other ladder? A. Yes, sir.

Mr. ZIEGLER.—That is all.

(Witness excused.)

Testimony of Dr. R. V. Ellis, for Defendant.

Dr. R. V. ELLIS, introduced as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Will you please state your name?

A. R. V. Ellis.

Q. You are a physician and surgeon?

A. Yes, sir. [109]

Q. How long have you been practicing, Doctor?

A. Eight years.

Q. What is the nature of your practice,—what kind of practice—any special—

A. Medicine and surgery.

Q. Where did you graduate, Doctor,—from what school? A. Willamette University.

Q. Where have you practiced since you graduated?

A. In Oregon and Alaska.

Q. What has been the nature of your practice in Alaska?

A. It has been connected with the Treadwell Mining Company, and the Kensington Mining Company, general practice at Douglas, and with the Chicagoff Mining Company.

Q. Have you had much experience in examining personal injury cases and treating personal injury cases? A. Considerable.

Q. Over how long a period of years?

A. Seven years.

Q. A period of seven years? A. Yes.

(Testimony of Dr. R. V. Ellis.)

Q. That was at Treadwell and Chicagoff?

A. Yes, and Kensington.

Q. Those are quartz mines? A. Yes, sir.

Q. Now, Doctor, how long have you been in Ketchikan? A. Since the 15th of March I think it is.

Q. Do you know D. J. Gover, the plaintiff in this case? A. Yes, sir.

Q. Did you ever treat him? A. Yes, sir.

Q. Who employed you to treat him, Doctor?

A. Why, he came in from Loring,—I don't know who sent him—sent by the Alaska Packers' Association to be treated by me.

Q. Have you any contract with the Alaska Packers' Association? [110] A. No, sir.

Q. Are you in their employ in any way?

A. No, sir.

Q. Or were you at the time Gover came to you?

A. No, sir.

Q. Now, Doctor, will you explain to the jury the nature of Mr. Gover's condition, and the nature of your treatment, and the result of it?

A. When he first came up he complained of general soreness and lameness in the back lower part of the spine, and inability to get around without crutches and particularly the severe pain that he had at various times; he claimed turning over in bed and trying to straighten up and walk were very difficult, and he seemingly couldn't do it, and I couldn't recognize any physical derangement at the time of the first examination, and continued to note him very closely for a good many days, and I arrived at the conclusion

(Testimony of Dr. R. V. Ellis.)

that he either had lumbago, which is a condition that affects the lower part of the spine or spinal muscles, or that he perhaps could be rheumatic,—and I arrived at the conclusion at last that he had a typical case of lumbago. I treated him with applications of heat, which is considered the treatment for cases of lumbago, and he seemed not to respond to this treatment in any way. The symptoms seemed to be the same right along, and the symptoms were pain in the back—lower part of the spine, and a certain amount of pain and rigidity down the lower limbs.

Q. Did you examine to see whether there were any injuries to any of the bones of the back and hips?

A. Physical examination?

Mr. ZIEGLER.—If the Court please, that is very leading. I think if he asks the witness to testify what kind of an examination he made it would be a more proper question.

The COURT.—Yes; but the vital question is not if he made an examination, but what he found. If he leads on that of [111] course I will sustain your objection, but this question is simply, did you examine him. You can answer that yes or no.

The WITNESS.—Yes, sir.

Q. (By Mr. FAULKNER). What did you find as a result of this examination?

A. Found no evidence of external injury on the surface to the muscles of the spine and hips, no curvature, no crepitus on manipulation of any of the bony tissues.

Q. Did you find any evidence of an accident?

(Testimony of Dr. R. V. Ellis.)

Mr. ZIEGLER.—Now, I am going to object to that as very leading.

The COURT.—What did you find with reference to an accident? The way you put the question it is leading.

Q. What objective symptoms did you observe, if any? A. They were all subjective throughout.

The COURT.—I do not know whether the jury knows what that means.

Q. Explain to the jury the difference between subjective and objective symptoms, if you will.

A. Objective symptoms are symptoms I or anybody could recognize as a proper cause of the condition. Subjective symptoms are symptoms that are complained of by the patient.

Q. Something the patient tells you? A. Yes.

Q. You say you found no objective symptoms?

A. No.

Q. Of any kind. How long did you treat Mr. Gover, Doctor?

A. From May 26th, I think, until July 1st or 2d—somewhere along there,—I think it was the second.

Q. From May until July? A. Yes.

Q. Now, at any time were you told by the Alaska Packers' Association, this defendant, to discontinue your treatment? A. No, sir.

Q. When Mr. Gover came to see you, Doctor, did he complain that he was unable to walk without crutches? A. Yes, sir. [112]

Q. And how did he get to your office when he came—how did he come? A. I couldn't say.

(Testimony of Dr. R. V. Ellis.)

Q. I mean, did you see him come in and out?

A. He came upstairs on crutches; yes.

Q. Did you call on him in his room at the hotel at any time during the course of your treatments?

A. Yes, sir.

Q. What did you find him doing?

A. I found—I went two or three times—found him in bed sometimes, sometimes sitting on the edge of the bed, and once I didn't find him.

Q. Once you didn't find him in at all? A. No.

Q. What did you find in the room, if anything?

Mr. ZIEGLER.—Just a minute, if the Court please—what he found in the room in the plaintiff's absence I think is immaterial.

Mr. FAULKNER.—I think it is very material.

The COURT.—I can see how it might be material,—if it is immaterial, Mr. Ziegler, it cannot hurt you.

Q. What did you find in the room at the time he was absent, Doctor?

A. I had been there twice that day. The first time I stayed quite a while—quite a long time with him, talking to him, trying to get history—examining as to reflexes, and at that time I thought perhaps there might be rheumatic tendencies. I went over to the drug-store and stood around for a while,—I didn't tell him I would bring him back a prescription—I figured on sending it to him, but I brought it back myself, and that is the time I knocked on the door and there was no answer, so I had the bottle in my hand and I opened the door. He was gone, but the

(Testimony of Dr. R. V. Ellis.)

crutches he had been using were there.

Q. The crutches were in the room, you say?

A. Yes.

Q. You spoke about reflexes—state to the jury about the condition of the reflexes. [113]

A. The Patellar reflex, at the time in the room at the hotel there, seemed to be a little exaggerated. There was no loss of reflex of the Patellar reflex. If it was other than normal it was exaggerated.

Q. That is the reflex at the knee? A. Yes, sir.

Q. All right, go on.

A. Oh, it seemed to me at that time that he had a little exaggerated Patellar reflex.

Q. Did you examine any other reflexes?

A. No other excepting the plantar.

Q. How was that? A. That was positive.

Q. Where is that, Doctor?

A. That is the toe sign—striking the foot and you would have a spastic condition of the toe.

Q. Let me ask you this question. If a man has loss of reflex—first, is it possible for a man to conceal or cover up the Patellar reflex and the other reflexes? A. Yes, sir.

Q. He can show an absence of the reflexes by practice? A. Yes.

Q. It is possible to do that. Now, in the case of loss of sensation, hysteria, anesthesia or paresthesia—all of those symptoms, can they be feigned to any extent? A. No, they cannot be feigned.

Q. They cannot be feigned? A. Not frequently.

Q. How would you explain it if a man had pares-

(Testimony of Dr. R. V. Ellis.)

thesia or anesthesia—how would you explain that—what would that be due to, generally, of the lower limbs?

A. Usually due to, possibly,—several things,—it might be due to a tuberculosis of the spinal region, or it might be due in some cases to psychosis or neuroses—for instance, [114] stigmatic hysteria, in all cases there is paresthesia and anesthesia.

Q. Due to disease? A. Due to psychic disease.

Q. What is psychic disease? Explain that to the jury.

A. It is a condition due to the mind dwelling upon certain thoughts, having certain ideas in view, for a certain length of time, and there is a stigmatic degeneration that really develops.

Q. You would bring your mind to bear on that certain symptom and you would develop the symptom?

A. Yes, according to the symptom. Those symptoms of paresthesia and anesthesia are most marked in stigmatic hysteria.

Q. And those can be due to a hysterical condition?

A. No; hysteria has a different phase,—that phase of hysteria is a direct entity,—it is due to a psychic phenomenon.

Q. This anesthesia and paresthesia that you were speaking of can be produced by the mind?

A. Yes, sir.

Q. Acting along certain lines and certain ideas?

A. Yes, sir.

Q. Would it be possible for a man who has an ac-

(Testimony of Dr. R. V. Ellis.)

tion for personal injuries pending to develop any of those symptoms from a condition of mind caused by the pending litigation? A. I don't know.

Q. Have you observed any of those conditions in cases?

A. I have been on several cases of paresthesia and anesthesia in an analysis made by an analyst, when they were pronounced as stigmatic hysteria.

Q. And that sometimes clears up after the case is tried?

A. Well, I don't know whether I could follow that out or not, I am sure.

Q. Could a person have a lesion of the spinal cord which would cause a disturbance of the lower limbs and perhaps a disturbance of the lower reflexes and the nerves, without having an injury? [115]

A. Yes, sir.

Q. What would that be due to, where there was no injury?

A. Well, there are numerous conditions. We have one we call spondylitis—this is a condition—as far as the cause is known which has been absolutely sifted out—regarding syphilis—not a toxic condition, but as a direct entity—causes spinal necrosis—the spinal cord and the tracts involved—the reflex tracts especially, and you might have a tubercular condition of the spinal cord that would cause paresthesia and anesthesia.

Q. How is the spinal cord protected? Could you explain to the jury briefly how the spinal cord is protected by the bony structures?

(Testimony of Dr. R. V. Ellis.)

A. Protected in front by the bodies of the vertebrae, behind by the lining of the vertebrae with tissue around it, which is protected by a cartilage, similar to the cartilage in the nose. There is no place in the spinal column but what we have about $\frac{3}{8}$ inch of bony tissue between the surface of the bone and the spinal cord.

Q. Now, is there anything else around the spinal cord—a sheet?

A. Yes; there is a very hard fibrous sheet that extends and protects the cord directly inside of the lamina of the bone—the spinal canal.

Q. Now, Doctor, in your opinion would it be possible for a man to have a lesion of the spinal cord due to a fall without having a fracture of some of those bones, or a dislocation?

A. It is very improbable.

Q. Now, in your opinion would it be possible for a man 69 years old to fall a distance of 21 feet—fall backwards a distance of 21 feet, and be thrown out a distance of 7 feet 3 inches, striking an iron rail, without breaking some bones or dislocating some bones?

A. It seems as though it would be impossible.

Q. You think it would be impossible? [116]

A. Oh, impossible things happen sometimes but it has not been my experience; and judging from my experience I would say that cases arising out of a fall, it would be practically impossible not to break a bone—especially if you light on the back.

(Testimony of Dr. R. V. Ellis.)

Q. Would it be possible to have a fall like that without having any bruises or discolorations where you struck?

A. No, that would be absolutely impossible.

Q. Now, Doctor, I want to ask you this question: When Mr. Gover came to you first did he have any discussion with you about a lawsuit for damages?

A. No, not at first.

Q. Well, at any time did you have any conversation with him in which he discussed damages—

A. About a lawsuit—no, he didn't say anything. He spoke to me several times trying to get me to say he was badly injured and that the company ought to send him below and take care of him. He wanted to know if I thought he would be able to work this winter again, and I told him I couldn't know until I found out how he got along. He seemingly did not get any better, and he asked me several times to see if I could not fix it up with Fred Heckman to send him down—wanted me to agree that the company ought to stand for those kinds of things. I said "If it is necessary I will do all I can to see that you get along," but I couldn't arrive at any conclusion that there was an injury. I still think it was lumbago. I haven't seen him since July—

Q. You haven't examined him since July, when he left you? A. No.

Q. I will ask you again, at any time did Mr. Patching or Mr. Heckman send you word to discontinue your treatment, Doctor? A. No.

(Testimony of Dr. R. V. Ellis.)

Q. Who paid you for the treatments you gave Mr. Gover? A. The company.

Q. And you found no evidences of any injury when he came to you? [117] A. No, sir.

Q. Nor in any of your examinations?

A. No, sir.

Mr. FAULKNER.—That is all.

Cross-examination.

(By Mr. ZIEGLER.)

Q. Doctor, you say he told you that he wanted to get you to say that he was injured so the company would take care of him? A. Yes, sir.

Q. He told you he was injured and wasn't well, didn't he? A. Yes.

Q. You didn't think anything strange about that, did you? A. No; I was sure of it at once.

Q. If he were injured there would not be anything strange about him saying the company should take care of him? A. No.

Q. And you didn't pay much attention to that?

A. Yes, I did. The idea was that he didn't say anything about this at the first few examinations and treatment, and by that time I had concluded there was no injury, and that is the reason I didn't feel as though I could go to the company and say that the man was injured as he wished me to do.

Q. You didn't go to them, did you,—you didn't tell them he was injured?

A. No, I didn't tell them he was injured.

Q. Did you tell them he wasn't injured?

(Testimony of Dr. R. V. Ellis.)

A. I don't believe I did. I told them I thought he had lumbago.

Q. You thought he had lumbago? A. Yes, sir.

Q. That was the result of your diagnosis?

A. Yes, sir.

Q. You say you haven't seen him since July?

A. No,—I have seen him but I haven't examined him.

Q. You haven't examined him since July? [118]

A. No.

Q. Are you in a position to say at the present time that he is now suffering with rheumatism or any form of rheumatism? A. I am not.

Q. Now, Doctor, an injury to the nerves of the spine could occur from a fall, couldn't it?

A. Yes, sir.

Q. A man falling 21 or 25 feet, if he should happen to strike on the fleshy part of the buttocks, it wouldn't show much,—it would be possible to have a fall like that and not be much bruised, wouldn't it?

A. We have these—

Q. Wouldn't necessarily show bruises?

Mr. FAULKNER.—Wait a minute—let the Doctor finish his answer.

The WITNESS.—What is the question?

(Question read to the witness.)

A. It would be pretty hard to answer that question, Mr. Ziegler.

Q. What I am getting at is, if a man should fall 20 or 21 feet and should happen to land on the fleshy

(Testimony of Dr. R. V. Ellis.)

part of the buttocks, it would not be likely to show bruises on his back, would it.

A. No—the place of contact.

Q. There would be some bruises there?

A. There should be, yes,—25 feet.

Q. You say you haven't examined him since July?

A. No.

Q. If Dr. Mustard testified that one of the buttocks, I forget which one, the right or the left, shows a decided shrinkage at the present time, apparent to the eye, would you say that that was due to lumbago? A. Very possibly.

Q. Very possibly—would you say that it would be likely to be from lumbago?

A. That is very hard to tell. Under the classification of lumbago as a subject many, many conditions may develop as time goes on, [119] from the seat of the internal trouble, due to contraction of the spinal muscles.

Q. Would lumbago affect the control of the bladder and the bowels?

A. Not unless the lumbago becomes fibrous, which it does in about 40 per cent of the patients, and that would affect all the nerves around the condition existing as lumbago, and the impairment of those nerves would naturally destroy the sympathetic reflexes.

Q. And the process is very fast—degeneration—in those organs, is it?

A. Degeneration is not rapid as a rule, slow.

Q. Would it be likely that a man who would re-

(Testimony of Dr. R. V. Ellis.)

ceive an injury such as has been described here,—would it be likely that if he had had rheumatism, would it be likely to affect those organs—that is what I am trying to get at?

A. Strictly rheumatism—it would be unlikely to affect that.

Q. You say you graduated from school 8 years ago, Doctor? A. Yes, sir; in June.

Q. Did you put in any time after that in hospitals?

A. Yes, sir.

Q. How much time did you put in in hospitals?

A. I put in a year.

Q. And you have been engaged in the actual practice for seven years? A. Seven years; yes.

Q. Most of that time has been with mining companies?

A. Mining companies, and private practice in Douglas, Alaska.

Q. How long did you practice privately at Douglas? A. Less than a year.

Q. And the rest of the time you put in working for the mining companies? A. Yes, sir.

Q. The Treadwell Company? A. Yes, sir.

Q. The Chichagoff Company? A. Yes, sir.

Q. And the Kensington Company? [120]

A. Yes, sir.

Q. You stated you were not under contract with the Alaska Packers' Association at the time of the injury—are you now? A. No, sir.

Q. Are you looking for a contract with them?

A. No; I haven't made any application.

(Testimony of Dr. R. V. Ellis.)

Q. You have contracts with a number of companies around here, don't you, Doctor?

A. With the Salt Chuck Mining Company and Smiley's Cannery—that is all.

Q. Now, an injury to the spinal cord, Doctor, would be hard to determine, wouldn't it, from a surface examination? A. An injury to the cord?

Q. To the cord; yes.

A. Injuries to the cord, if from a traumatic source, are either due to dislocation or fracture of the vertebrae.

Q. I did not ask you what it was due to,—I asked you whether it was easy or difficult to ascertain.

A. It is quite difficult; yes.

Q. Would it be possible for a man falling a distance of 20 or 25 feet, to sustain an injury to the spinal cord? A. Oh, yes.

Q. Would it be possible to cause an injury to the nerves controlling the bladder and the bowels?

A. Yes.

Q. And the lower regions?

A. It would be possible; yes, sir.

Q. That would be possible? A. Yes, sir.

Q. If it should develop that the patient has no Patellar reflex at the present time, what would that be due to?

A. More than likely due to,—it is possible it is due to a spinal lesion, or it might be due to a clotted spinal region—

Q. That would not be due to lumbago, would it?
[121]

(Testimony of Dr. R. V. Ellis.)

A. Very probably.

Q. Isn't it a fact that in rheumatic lumbago the reflexes are exaggerated?

A. There is no such thing as rheumatic lumbago. Lumbago is a direct entity by itself, and it is due to — changes, usually.

Q. I understood you to say that when you examined him the reflexes were a little exaggerated?

A. Yes, sir.

Q. At that time you thought he had lumbago, didn't you?

A. Yes; I thought he had lumbago right straight through.

Q. And that condition exists, does it, in lumbago?

A. They may exist. If the lumbago is fibrous, if there was any irritation to the nerves, you would have an exaggerated reflex.

Q. If he has not reflex at all at the present time, would that be a symptom of lumbago?

A. No, sir.

Q. You haven't made any tests on the patient to determine that? A. Not lately.

Q. Now, in your examinations when Mr. Gover came to you, Doctor, how many times did you make a physical examination in which you had the body stripped?

A. It is pretty hard to say. I saw him three or four times in bed at the hotel, and he stripped to a certain degree on a number of occasions.

Q. Did you go over him on all of those occasions?

A. Not every time.

(Testimony of Dr. R. V. Ellis.)

Q. How many times would you say you made a thorough examination of the patient?

A. As far as a thorough examination of the patient, I didn't do it at any one time.

Q. It is a fact, Doctor, that people often have things the matter with them where they have to call in different diagnosticians to determine what is wrong with them—isn't that a fact?

A. Oh, yes. [122]

Q. And one doctor may think a person has a certain disease or ailment and another doctor would be absolutely of a different opinion?

A. Yes, sir.

Q. You have seen that, haven't you?

A. Very ordinary, yes, sir.

Q. And if someone should hold an opinion different to yours sometimes you would not say he was wrong, would you?

A. No, not unless I knew he was wrong.

Q. When Mr. Gover came to you he came with a letter from the Packers, didn't he, to you?

A. I think so,—I think they all do.

Q. Asking you to take care of him?

A. Yes, sir.

Q. And you did your best for him? A. I did.

Q. And you became suspicious about the man, didn't you? A. I did.

Q. Thought he was a faker?

A. I don't believe that I ever mentioned he was a faker.

(Testimony of Dr. R. V. Ellis.)

Q. Well, I am asking you if you do think that now?

A. Well, whatever the definition of faker is,—my idea of the man was that there were a good many symptoms that he complained of that were not a reality,—it was imaginative hysteria perhaps.

Q. They were imagination?

A. I didn't say that. I say if there was really something the matter with him in its direct entity the stigmata of hysteria was perhaps associated with it because I know some of the symptoms that he complained of do not automatically change.

Q. You say if there were really anything the matter with him? A. At that time, yes.

Q. Do you mean to say there is nothing the matter with Mr. Gover at the present time?

A. I don't know—I couldn't say anything about it. [123]

Q. Do you mean to say there wasn't at the time you treated him? A. No, I didn't say that.

Mr. ZIEGLER.—That is all.

Redirect Examination.

(By Mr. FAULKNER.)

Q. You said if there were an injury to the spinal cord due to a traumatic condition there would be evidence of a fracture or dislocation, is that true?

A. Yes, sir. I will have to alter that statement,—excepting possibly of a missile, knife or bullet wound that entered into the vertebral spaces.

Q. But an injury to the spinal cord due to a fall

(Testimony of Dr. R. V. Ellis.)

of the application of external force would show a dislocation or fracture of some bone?

A. Well, show—what do you mean by show?

Q. I mean it would be present—there would be a fracture or dislocation?

A. It would have to be there, yes, sir.

Q. Will you explain to the jury what you mean by a traumatic condition? A. Due to injury.

Mr. FAULKNER.—Traumatic means due to an injury. That is all.

(Witness excused.)

Testimony of G. F. Heckman, for Defendant.

G. F. HECKMAN, upon being called as a witness on behalf of the defendant, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. I think you have been sworn already?

A. Yes, sir.

Q. Your name is G. F. Heckman? A. Yes.

Q. You said you were superintendent at the Loring cannery of the [124] Alaska Packers' Cannery Company? A. Yes.

Q. Now, Mr. Heckman, you are acquainted with Mr. Gover? A. Yes, sir.

Q. The plaintiff in this case. How long have you known him?

A. Not very long,—not until after he come over to the doctor.

(Testimony of G. F. Heckman.)

Q. A short time after he came over to the doctor?

A. Yes. I had seen him before that time.

Q. Was the treatment given him in Ketchikan by Dr. Ellis given under your direction?

A. Yes. I think there was a card sent over to the hospital.

Q. Was there any time that you stated to him or to anyone else that you were going to discontinue taking care of him? A. No.

Q. Now, Mr. Heckman, did you see Mr. Gover last Monday of this week, on the street?

A. Yes, sir.

Q. In Ketchikan—where was that?

A. That was down by the float—at the city float.

Q. Down by the city float?

A. Yes—down here.

Q. Towards New Town?

A. Yes, towards New Town.

Q. Will you explain to the jury what he was doing, in your own way?

A. I seen him walking along with both crutches under his arm, and reach in his pocket for a package. There was another gentleman with him, and he must have walked pretty close to a hundred feet or more—I couldn't tell exactly,—he had both crutches under one arm and he was reaching in his pocket at that time.

Mr. ZIEGLER.—For a package?

A. Yes,—I don't know whether it was for a package of tobacco or what it was.

Mr. FAULKNER.—That is all. [125]

(Testimony of G. F. Heckman.)

Cross-examination.

(By Mr. ZIEGLER.)

Q. Do you know whether Mr. Gover uses tobacco, Mr. Heckman? A. No, I do not.

Q. You say you did not tell Dr. Ellis to stop the treatments? A. No, I didn't.

Q. You talked with Mr. Gover about that, didn't you? A. Yes.

Q. And you told Mr. Gover that the Doctor said there wasn't anything the matter with him?

A. No; I said the Doctor said he had rheumatic conditions, and lumbago, and he couldn't find any sign of any injury of any kind.

Q. And you told him at the Stedman Hotel, you would not be responsible for room rent any more?

A. No; I told him I would send him down below if he wanted to go down, and he said, "I will see about it," and he went out and never came back to give me an answer, and I didn't know what he would do.

Q. Did you tell him at that time if he would sign a release contract you would pay his way down?

A. I did not,—he had already signed the pay-roll.

Q. You didn't say anything about signing up at all? A. No.

Q. Did you tell anybody at the hotel that the company would not be responsible for his room rent?

A. I did not.

Q. You never told anybody that? A. No.

Q. Are you sure of that? A. Yes.

(Testimony of George A. Brown.)

Mr. ZIEGLER.—That is all.

(Witness excused.) [126]

Testimony of George A. Brown, for Defendant.

GEORGE A. BROWN, introduced as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. State your name, please.

A. George A. Brown.

Q. Where do you live? A. Ketchikan.

Q. How long have you lived here?

A. Twenty-three years.

Q. Do you know Mr. Gover, the plaintiff in this case?

A. I met him last Sunday, the first time.

Q. Did you see him last Monday, in Ketchikan?

A. Yes.

Q. Where did you see him?

A. I was walking with Mr. Heckman down to get some trays made in the shop, and he came along—he was nearly opposite to us, and Mr. Heckman says, “That is the man from Loring who has a suit against us.” “Why,” I said, “He don’t seem to be hurt very bad.” He said, “It don’t look it to me, either.” He was walking along, you see, with a Mexican—he had a Mexican with him, on the other side, and they stopped and were looking at some boats, and he took this crutch from the right hand

(Testimony of George A. Brown.)

and put it under the other arm, and went in his pocket for something with this hand—I don't know what he wanted, and he kept on walking up town.

Q. He had both crutches under one arm?

A. He had both crutches under one arm when I saw him.

Mr. FAULKNER.—That is all.

Cross-examination.

(By Mr. ZIEGLER.)

Q. How long did you watch him, Mr. Brown?

A. Just a few—a couple of minutes or so,—we were going along. [127]

Q. Was he ahead of you or back of you?

A. No; he was just opposite of us, coming up on the opposite side of the street.

Q. You watched him for a couple of minutes, you say?

A. We naturally took a look to see how he was getting along.

Q. How far did he walk then?

A. I judge it was somewheres around 50 or 60 feet,—I watched him, you see.

Q. You are quite positive of that, are you?

A. Yes, sir.

Mr. ZIEGLER.—That is all.

(Witness excused.)

Testimony of J. R. Heckman, for Defendant.

J. R. HECKMAN, introduced as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Please state your name.

A. J. R. Heckman.

Q. Where do you live? A. Ketchikan.

Q. How long have you lived here, Mr. Heckman?

A. Thirty years.

Q. Do you know the plaintiff in this case, Mr. Gover?

A. I know him by sight.

Q. Have you seen him in Ketchikan during the past two months at any time?

A. Yes, sir.

Q. Have you seen him on the streets?

A. Yes; I seen him several times on the streets.

Q. Have you ever seen him walking without his crutches?

A. Yes, sir; I seen him walking down in New Town, I guess, probably three weeks ago,—he was walking along—of course I was riding [128] in the car with my wife—and he was walking along as I would walk, with a crutch under each arm. I was coming up from the other end of town,—we were riding out in the car,—and of course we had him under kind of an observation ever since he has claimed he was hurt,—and he was carrying a crutch under each arm and walking along as you or I would walk.

(Testimony of J. R. Heckman.)

Mr. FAULKNER.—That is all.

Cross-examination.

(By Mr. ZIEGLER.)

Q. You say you have been watching him, Mr. Heckman?

A. I have watched him from time to time, yes.

Q. Because he claimed that he was injured?

A. Yes, sir.

Q. And that made you very suspicious?

A. I was very suspicious of him; yes.

Q. How much time did you put in watching him?

A. Every time I saw him I took notice of him. I have seen him around the business section here where he would use his crutches as though he was very badly hurt.

Q. Did you ever see him use them in any other place except the business section?

A. I think the only place is on the New Town walk; and I think I saw him once after that, on the New Town walk, when he was with a lady and little girl, or boy, I don't know which it was, and at that time he wasn't using his crutches,—he was walking without them.

Q. That is the only time that you saw him outside of the business district? A. Yes, sir.

Q. You saw him walking with his crutches under each arm, could you see him in the car?

A. I came along with the car, and came along slowly so as to watch him.

Q. You kept him in front of you, did you? [129]

(Testimony of J. R. Heckman.)

A. I kept him in front of me for a while, and then I passed on ahead.

Q. Did you stop your car to watch him?

A. No; I went on slow gear.

Q. You went very slow?

A. Very slow; yes.

Q. Just as slow as he was walking?

A. No; but I saw him for a distance behind, coming up this way.

Q. How long a time did you see him?

A. Oh, I suppose probably three or four minutes—maybe five.

Q. Sure of that, Mr. Heckman?

A. Yes, absolutely.

Mr. ZIEGLER.—That is all.

(Witness excused.)

Testimony of Mrs. J. R. Heckman, for Defendant.

Mrs. J. R. HECKMAN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Will you please state your name?

A. Mrs. J. R. Heckman.

Q. Where do you live, Mrs. Heckman?

A. Ketchikan.

Q. Do you know the plaintiff, Mr. D. J. Gover?

A. Only by sight.

(Testimony of Mrs. J. R. Heckman.)

Q. Have you seen him within the past two months, in Ketchikan?

A. Well, as near as I can remember, about three weeks ago I saw him on the New Town walk.

Q. How was he walking then, Mrs. Heckman?

A. With a crutch under each arm.

Q. Was he using the crutches to aid him?

A. No, sir; he had a crutch under each arm.

Mr. FAULKNER.—That is all.

Mr. ZIEGLER.—No questions.

(Witness excused.) [130]

Testimony of Milton Orton, for Defendant.

MILTON ORTON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Please state your name.

A. Milton Orton.

Q. Where do you live, Mr. Orton—where are you employed? A. Loring hatchery.

Q. Were you employed there on the 19th of last April? A. Yes, sir.

Q. Do you know J. D. Gover, the plaintiff in this case? A. Yes, sir.

Q. How long have you known Mr. Gover?

A. Since a year ago last July,—about the first of July some time.

Q. Did you, at the Loring hatchery, any time prior to the 19th of April, 1920, have any conversa-

(Testimony of Milton Orton.)

tion with Mr. Gover regarding accidents and compensation for accidents? A. Yes, sir.

Q. What was said by him?

A. Well, he came in my room to get me to write a letter for him, and at that time he asked me if I knew anything about this company insurance, and I told him no, that I didn't; and he says, "Well, put it in the letter that I am insured with the company for \$500," I think it was—I am not sure of the amount.

A. Put it in the letter? A. Yes.

Q. This was prior to the 19th of April?

A. Yes, sir.

Q. And he asked you if you knew anything about the insurance compensation? A. Yes, sir.

Q. That was in case of accident?

A. In case he was hurt, yes. [131]

Q. In case he was injured. Now, Mr. Orton, on the 19th of April did you see Mr. Gover lying at the foot of a ladder extending up to the top of the water-wheel flume?

A. Not at the foot of the ladder,—he was under the tramway.

Q. How far is that from the ladder?

A. Well, I should think it would be 7 or 8 feet.

Q. What was he doing down there?

A. He was just laying there.

Q. At that time, or at any time, did he point out to you this slat lying on the tramway?

A. No, sir.

Q. Did he point out to you any slat or rung of

(Testimony of Milton Orton.)

the ladder lying on the tramway, or anywhere else?

A. No.

Q. The slat I refer to is Defendant's Exhibit No.

4. Now, did he at that time say anything to you about the condition of the ladder?

A. Not that I heard, anyway.

Q. Said nothing to you?

A. Not that I heard.

Q. What did you do with him when you found him there under the tramway?

A. I believe I started to try to drag him out, and I went to look for Mr. Patching, and I met him coming, and the two of us dragged him or took him out.

Q. Where did you take him?

A. Took him up on the logging deck, and there was some lumber on the car and we unloaded that and put him on the car and took him to the bunkhouse.

Q. At that time did he point out this slat or any slat to you? A. No, sir, not to me.

Q. Did he at any time? A. No, sir.

Q. Did you ever see that slat before, Mr. Orton?

[132]

A. I never saw it before I came to town.

Q. Until Mr. Patching showed it to you?

A. No. I saw it on the ladder before it came off.

Q. You say you took him to the bunkhouse?

A. Yes, sir.

Q. Did you make any examination of him there?

A. Mr. Patching did.

(Testimony of Milton Orton.)

Q. Were you present? A. Yes, sir.

Q. Did you see any bruises on his body anywhere?

A. No.

Q. Any cuts? A. No.

Q. Any broken bones? A. No.

Q. Now, Mr. Orton, did you see Gover again during his stay at the hatchery,—did you see him any after that time? A. Oh, yes, several times.

Q. You saw him several times? A. Yes.

Q. Do you remember when he came to Ketchikan?

A. Yes, sir.

Q. Did you come down to the cannery with him?

A. Yes, sir.

Q. How did you get him from the hatchery to the cannery?

A. We brought him down the hatchery lake in a gas boat.

Q. That is the first lake?

A. That is the first lake; took him on a little tram car to the top of the hill, from there he walked down to the second lake.

Q. He walked to the second lake? A. Yes, sir.

Q. Then what did you do?

A. Well, he got in the boat at the second lake and we took him across—a rowboat. [133]

Q. Did he get in himself? A. Yes, sir.

Q. Then what did he do?

A. There was another tramway and we took him down on that tramway.

Q. Then where did you go?

A. Came to the salt lake.

(Testimony of Milton Orton.)

Q. Then where did you go?

A. Across a short portage and took another row-boat to Loring.

Q. How did he get across this portage?

A. I don't remember that.

Q. Did you give him any assistance?

A. I don't remember that.

Q. You took him in the rowboat down to Loring?

A. Yes.

Q. And then he came to town? A. Yes.

Mr. FAULKNER.—That is all.

Cross-examination.

(By Mr. ZIEGLER.)

Q. You are working up there now, Mr. Orton, with Mr. Patching? A. Yes, sir.

Q. And expect to continue to work there?

A. I don't know.

Q. As far as you know you do?

A. As far as I know, yes.

Q. And you have talked this case over up there quite a bit, haven't you? A. Talked it over some.

Q. And the general impression was up there that Mr. Gover was feigning being injured, wasn't it?

A. I believe so.

Q. That was the general impression up there. Now, when he fell there on that day, you were the first one there, weren't you? A. I think so. [134]

Q. Now, Mr. Orton, didn't you ask Mr. Gover what was the matter? A. I believe I did.

Q. And didn't he tell you that that damned ladder

(Testimony of Milton Orton.)

up there gave way, it was rotten,—didn't he tell you that? Try and think.

A. He told me that he fell from the top of the ladder.

Q. Didn't he point up there to it?

A. I believe he did.

Q. And didn't you tell him you knew it was rotten yourself and that you would never have gone up there unless the old man had gone before you?

A. No, I never did.

Q. You didn't tell him that? A. No.

Q. You are positive of that?

A. I didn't tell him anything of that kind at all. I was busy getting him out under the tramway and I didn't pay any attention to the ladder at the time.

Q. And you are positive you didn't say that?

A. Yes, sir.

Q. You stated before that you stepped away and waited there a while for Mr. Patching to come up, didn't you?

A. After I tried to pull him out I went to look for Mr. Patching, and I met him a short distance away, and we both went back.

Q. And you were there quite a while while you were waiting for Mr. Patching, weren't you?

A. No, I wasn't,—I was trying to get him out.

Q. Just what did you say to Mr. Gover?

A. Oh, I don't remember,—there was no reason why I should remember every word that I said to him.

Q. Are you willing to swear that you didn't say

(Testimony of Milton Orton.)

that you knew that ladder was rotten and you wouldn't go up it unless the old man went up first?

A. I certainly am, yes.

Q. But now you say you don't remember what you said. [135]

Mr. FAULKNER.—I object to that line of questioning as arguing with the witness.

The WITNESS.—I said I don't remember all of what I said,—I might have said other things that I don't remember.

The COURT.—A person might not be able to remember what he said but he can remember what he did not say.

Q. Now, when Mr. Gover spoke to you about this insurance, did you have any insurance there?

A. I told him I didn't know a thing about it.

Q. Did you ever in your life before talk to anybody about any insurance or compensation acts,—you are a workman, aren't you?

A. I probably have in my life, but not up there, that I remember of.

Q. Did you think anything peculiar or suspicious about this?

A. No, not until he told me to put it in the letter—I thought it was kind of queer.

Q. You don't know but what he was writing to his wife down at Cottage Grove?

A. Sure, I was writing it for him.

Q. And you were writing to his wife? A. Yes.

Q. And you thought she wasn't interested in the matter at all.

(Testimony of Milton Orton.)

Mr. FAULKNER.—I object to that—purely argument.

Mr. ZIEGLER.—All right, I will withdraw the question, and ask this question.

Q. Did you think there was anything strange about a man writing to his wife and telling her about any insurance or compensation a working man may be entitled to? A. Not if he was injured, no.

The COURT.—I do not think it makes any difference whether he thought it was strange, Mr. Ziegler.

Mr. ZIEGLER.—All right. That is all.

(Witness excused.) [136]

Testimony of Carl Peterson, for Defendant.

CARL PETERSON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. Mr. Peterson, state your name, will you?

A. Carl Peterson.

Q. Where do you live, Mr. Peterson?

A. Over at the Loring hatchery.

Q. Do you know Mr. Gover. the plaintiff in this case? A. Yes, sir.

Q. Were you out at the Loring hatchery on the 19th of April last? A. Yes, sir.

Q. Were you there prior to that time?

A. No, I was down the lake when it happened.

Q. No, you do not understand me,—how long have you been at the hatchery?

(Testimony of Carl Peterson.)

A. I have been up there 7 years and 6 months.

Q. You were there all the time Mr. Gover was there? A. Yes, sir.

Q. Did you at any time, at the hatchery, tell Mr. Gover that the ladder that extended up the side of the flume, over the water wheel, had been there for 20 years?

A. No, sir, and he hasn't asked me, either. I don't know how old that ladder is there,—I couldn't tell anything about it, and Mr. Gover has not asked me that yet.

Q. He never asked you? A. No.

Q. Mr. Peterson, you are still at the hatchery—still working? A. Yes, sir.

Q. Were you there while Mr. Gover was in bed, in the bunkhouse? A. Yes, sir.

Q. After he claimed to have been injured on the 19th of April? A. Yes, sir.

Q. Did you examine his body?

A. Yes, sir,—only Mr. Patching was in there to fix it. [137]

Q. Did you help take care of him?

A. Some time, but not all the time.

Q. Did you see him the 19th of April, the day he claimed he fell? A. Yes, sir, I did.

Q. Did you see Mr. Patching examine him that day? A. Yes, sir.

Q. Did you see any bruises or cuts on his body?

A. No, nothing.

Q. Now, Mr. Peterson, while he was in bed there

(Testimony of Carl Peterson.)

did he complain to you of any trouble—any symptoms—any pain?

A. Yes; one time he was in there hollering in the night-time—hollering—making a lot of noise, so in the morning I told him if he keep on like that he have to ask Mr. Patching for another room—I couldn't sleep, and after that he was quiet.

Q. You told him to quit hollering?

A. Yes, sir.

Q. And after that he was quiet? A. Yes, sir.

Q. Did he complain of not being able to move his legs? A. No, he didn't.

Q. I say did he complain of that?

A. He couldn't move his legs, but one night I was laying in bed there and he had his foot up over the other bunk there, stretching himself.

Q. Did he see you when he was doing this?

A. No, sir.

Q. Did he see anybody?

A. No, sir; the other fellows had gone to bed, and I was going to bed, too,—I had my bunk right close to him, and I just happened to look over there, and he had his foot up on the other bunk.

Q. Both feet? A. No, only one.

Q. To stretch his feet? A. Yes, sir. [138]

Q. Now, Mr. Peterson, you are quite sure there were no bruises or cuts on him?

A. Yes, sir, I am sure of that.

Q. And no broken bones?

A. Not that I could see.

Mr. FAULKNER.—That is all.

(Testimony of Carl Peterson.)

Cross-examination.

(By Mr. ZIEGLER.)

Q. You say he didn't see you when he was stretching himself? A. No, sir.

Q. How do you know he didn't ?

A. He couldn't see me.

Q. But you could see him, couldn't you?

A. Yes, sir.

Q. Why couldn't he see you?

A. No, he couldn't see me because there was an old coat hanging there—I look underneath, and he couldn't see me.

Q. Couldn't he look underneath it, too?

A. No, sir.

Q. But you could, couldn't you? A. Yes, sir.

Q. You could see him? A. Yes, sir.

Q. But he couldn't see you?

A. No, sir; because he was laying the other way—backward.

Q. You have worked there, you say, 7 years and 6 months?

A. Yes; maybe two or three days one or the other way—I don't know that.

Q. Did you hear Mr. Patching testify in this case, —you heard Mr. Patching's testimony?

A. I don't understand.

Q. You heard Mr. Patching when he was on the witness-stand, didn't you? A. Yes, sir. [139]

Q. You heard him say that ladder was put up there about 8 years ago? A. Yes, sir.

Q. And you went there 7 years and 6 months ago?

(Testimony of Carl Peterson.)

A. Something like that.

Q. You said you didn't know how old the ladder was,—you don't know how old that ladder was?

A. No, sir.

Q. How did it look when you first went there, do you remember?

A. Yes, I remember that because I was up there the third day after I was coming there.

Q. How did the ladder look then?

A. Looked pretty good.

Q. It looked pretty good? A. Yes.

Q. Like a new ladder?

A. Well, it looks good—it hadn't been long there, I could see that, but I couldn't say how long.

Q. You say Mr. Gover was hollering one night?

A. Yes, sir.

Q. Was that shortly after he was injured,—was that a day or two after he was injured by the fall?

A. I don't know,—maybe three or four days after.

Q. What was he hollering for?

A. Always make lots of noise,—in the day-time, too.

Q. How would he make a lot of noise?

A. He said it was so bad he had to holler.

Q. By hollering you mean groaning?

A. Yes, sir.

Q. Like a person in pain? A. Yes, sir.

Q. And you jumped on him and told him he couldn't groan around there, didn't you?

A. Yes, sir—I told him to cut it out.

(Testimony of Carl Peterson.)

Q. Told him that he had no business to groan?

[140] A. I didn't say that.

Q. You told him to cut it out, didn't you?

A. Yes, sir; I told him to cut it out.

Q. And he did cut it out? A. Yes, sir.

Mr. ZIEGLER.—That is all.

(Witness excused.)

(Whereupon court adjourned until 10 o'clock the following morning.)

MORNING SESSION.

December 4, 1920, 10 A. M.

Mr. ZIEGLER.—If the Court please, I would like to recall Mr. J. R. Heckman for one or two questions on recross-examination.

The COURT.—Very well.

Testimony of J. R. Heckman, for Defendant (Recalled.)

J. R. HECKMAN, upon being recalled, having been previously duly sworn, testified as follows:

Recross-examination.

(By Mr. ZIEGLER.)

Q. Mr. Heckman, you stated yesterday that when you saw Mr. Gover he was walking along the street with one crutch under each arm?

A. There was a crutch under each arm but they were kind of dragging behind as he was walking along.

Q. Will you take the crutches and explain your testimony in that respect?

(Testimony of J. R. Heckman.)

A. He wasn't walking as I was walking, but he walks of course as an old man would walk—he was dragging his crutches like that; later on I saw him and he couldn't step without them—on the same day.

Q. Did you see him that way all the time, or did you see him put his crutches back under his arms then?

A. As I passed by him, by the time I passed, his crutches were [141] still dragging and I didn't look around.

Q. You never looked around? A. No.

Q. You were not interested enough to do that?

A. I was kind of interested because I was suspicious of the case, yes.

Q. Mr. Heckman, you heard Mr. Faulkner state in his opening statement in this case that you were not interested in any manner in this case, didn't you?

A. Yes, sir—I am not interested in it.

Q. Now, Mr. Heckman, isn't it a fact that when the jury was being empanelled in this case that you told Mr. Faulkner to excuse the juror Larson?

Mr. FAULKNER.—I object to that as incompetent, irrelevant and immaterial, and not cross-examination.

Mr. ZIEGLER.—I want to prove Mr. Heckman's interest in the case. I think this is clearly competent, if the Court please.

The COURT.—Is that juror a juror in the case now?

Mr. ZIEGLER.—Not at present, no, your Honor,—he was excused.

(Testimony of J. R. Heckman.)

Mr. FAULKNER.—Mr. Heckman might be the defendant and still be testifying.

Mr. ZIEGLER.—Just goes to his interest in the matter, if the Court please.

The COURT.—What do you mean by interest?

Mr. ZIEGLER.—Well, if a witness manifests a great deal of interest in a certain case, I think that is a question affecting the weight of his testimony, if the Court please, that should be taken into consideration by the jury. Now, the statement was made in open court here before the jury—

The COURT.—“One interested in a case” ordinarily has reference to one having a financial interest in the case.

Mr. ZIEGLER.—That is the only object,—I am leading up to that, if the Court please.

The COURT.—I think on cross-examination he may bring out the extent of his interest. [142]

Mr. ZIEGLER.—Answer that question, Mr. Heckman.

The WITNESS.—What is the question again please?

Q. Now, Mr. Heckman, isn't it a fact that when the jury was being empanelled in this case that you told Mr. Faulkner to excuse the juror Larson?

A. I don't remember the man's name. Mr. Faulkner came back and asked me what I thought of the jury, and I pointed out one man I thought would not make a good juror—yes.

Q. And that was the man that Mr. Faulkner excused later?

(Testimony of J. R. Heckman.)

A. I don't know whether that is the man that he excused or not,—I am not sure that it was.

Q. Do you recall whether or not it was the man just preceding—

The COURT.—It does not make any difference now which man it was.

Mr. ZIEGLER.—All right.

Q. Mr. Heckman, you have no financial interest in this case at all?

A. No, but if you want me to I will tell you what interest I have.

Q. You may tell me what interest you have.

A. I worked for the Alaska Packers' Association for about 30 years and I have always found them to be on the square, and they were on the square with me, and when I quit them I quit of my own accord, and naturally my sympathies are with the Alaska Packers' Association.

Q. And that is the reason for your interest manifested in this case?

A. More or less—to see they get fair play.

Q. You think they are being very much taken advantage of, don't you, Mr. Heckman?

A. If you want me to tell you, I think it is a black-mail case, yes—if that is what you want me to say.

Q. You think Mr. Gover is here trying to hold the Alaska Packers' Association up for some money?

A. I certainly do.

Q. Would you swear to that, Mr. Heckman?

A. I couldn't do that. [143]

Q. Then it is only your opinion?

(Testimony of J. R. Heckman.)

A. My opinion, from the facts and circumstances I have heard since this case started.

Q. You understand, Mr. Heckman that it is possible for a man to be mistaken in his opinion, don't you? A. It is possible, yes.

Q. And you state this as your opinion?

A. It is my opinion.

Q. You have been an employer of labor for quite a while Mr. Heckman? A. Yes, sir.

Mr. ZIEGLER.—That is all.

Redirect Examination.

(By Mr. FAULKNER.)

Q. Mr. Heckman when was the first time that you mentioned to me that you had seen Gover carrying his crutches and not leaning on them for support?

A. Yesterday while the case was going on here,—yesterday afternoon.

Q. Yesterday afternoon in court? A. Yes, sir.

Mr. FAULKNER.—That is all.

(Witness excused.)

Mr. FAULKNER.—That is our case.

DEFENDANT RESTS. [144]

REBUTTAL.

Testimony of D. J. Gover, in His Own Behalf (In Rebuttal).

D. J. GOVER, the plaintiff herein, upon being recalled as a witness in his own behalf, having been previously duly sworn, testified in rebuttal as follows:

(Testimony of D. J. Gover.)

Direct Examination.

(By Mr. ZIEGLER.)

Q. Mr. Gover, you heard Mr. Peterson testify in this case, didn't you? A. Yes, sir.

Q. You know who he is?

A. Yes, sir, I know Mr. Peterson.

Q. Who is he?

A. He is considered the foreman by the men up there all the time.

Q. Foreman at the hatchery?

A. By the workingmen, yes, sir.

Q. He was such at the time you were there?

A. He was there but not working right there,—he was working down below there; yes, sir, he was there.

Q. Did you hear him testify you were hollering one night out there shortly after you were injured?

A. Yes, sir.

Q. Is that true?

A. No, I wasn't hollering.

Q. What were you doing, if anything?

A. I was groaning.

Q. Why were you groaning?

A. Well, sir, I was in such misery,—pain all through here, and such pain I didn't know what to do.

Q. You were suffering from the pain?

A. Indeed I was; and if I would lie on my left side it seemed like my heart would stop, and I tried to move back,—that was the trouble, I couldn't move myself.

(Testimony of D. J. Gover.)

Q. You couldn't move after you were injured very well?

A. No, indeed, I could not. [145]

Q. I think you stated on your direct examination in order to turn you they would have to pull the blankets with you?

A. They would pull the blankets with me. Mr. Archibald and Mr. Orton would turn me, and they pulled on the blankets because it hurt me so bad to move.

Q. And that is the only hollering you did there, Mr. Gover?

A. Yes, sir, that was the only hollering I did, was groaning.

Q. Now, did you hear Mr. Orton testify in this case? A. Yes, sir.

Q. Will you state what he said with reference to the fact that he knew that the ladder was rotten, and he would not have gone up there unless the old man had gone himself—did he ever say that to you? A. Yes, sir; he did.

Q. Just state the occasion of that.

Mr. FAULKNER.—I think this is repetition,—it is not rebuttal.

Mr. ZIEGLER.—Yes, it is rebuttal.

The COURT.—What does it rebut?

Mr. ZIEGLER.—In his testimony Mr. Gover said this took place,—I think I asked him if this was the day that he fell. In talking it over with Mr. Gover, Mr. Gover tells me it was not then, but it was later on in the bunkhouse.

(Testimony of D. J. Gover.)

The COURT.—Just ask him when it took place.

Q. When did that conversation take place, Mr. Gover?

A. It was after I was hurt,—in the bunkhouse.

Q. And that wasn't the day that you fell, then?

A. No, sir.

Q. Did you hear the witnesses testify, Mr. Gover, that after you fell you walked part of the way into the bunkhouse,—did you hear that?

A. Yes, sir. If I did I didn't know it.

Q. If you did walk any you don't remember it?

A. No, sir, I don't. I do remember they had a hard time putting me in the bunk, and got another bunk and put it outside as [146] soon as possible—I don't know, but I think that same night—put it out in front of the bunk I slept in.

Q. You heard Mr. Orton testify about some time prior to your injury you were talking about some insurance or something?

A. Yes, sir.

Q. Just explain that.

Mr. FAULKNER.—The same objection—that was asked him in the case in chief and it was explained in the defense. It only takes up time.

Mr. ZIEGLER.—I think it is a matter that should be explained.

The COURT.—My recollection is that that was something new developed by Mr. Faulkner on cross-examination—a part of the defense and not a part of the plaintiff's case,—you simply asked him some questions about it on cross-examination. Then the plaintiff goes on the stand and he is entitled to re-

(Testimony of D. J. Gover.)

but anything that you brought out on your case. If he had brought it out himself as part of his case, of course I would not permit it, because it would not be rebuttal.

Mr. FAULKNER.—That is right. I just wanted to save time. I don't have any serious objection to it.

Mr. ZIEGLER.—Answer the question, Mr. Gover.

The WITNESS.—Yes, sir,—it wasn't compensation, it was insurance,—it was a matter of insurance and some other matters I was sending down home.

Q. You were writing to your wife at the time?

A. Yes, sir.

Q. Mr. Orton was writing the letter for you?

A. Yes, sir.

Q. What did you state in the letter about your insurance?

A. That if a man got killed at the work there was a thousand dollars, was the way I understood it—if a man got killed; and I also asked Mr. Patching that night that I was going to go away what it was about that, and he said it wasn't anything. "Why," I said, "the boys talked about that quite a good deal— [147] several of the boys"—Sam—I don't remember saying the name right now, "and some of us were talking, and that is the way it was understood with the boys."

Q. And that is the reason you mentioned it to your wife in writing the letter?

A. Yes, sir; and that is the talk I had with Mr. Orton.

(Testimony of D. J. Gover.)

Q. Now, Mr. Gover, you heard the testimony of the witnesses about your walking along without your crutches? A. Yes, sir.

Q. Will you just explain that to the jury?

A. Yes, sir, I will. Gentlemen, I try every day to walk a little ways, a few steps, without my crutches. The doctors have all told me I wouldn't get well unless I did, and I have got a good deal of energy and I try all I can—try to walk a good deal every day, and if my wife is close to me I try harder because she will catch me if I fall.

Q. If you should walk four or five minutes, Mr. Gover, without your crutches what would happen?

A. I would just give out and fall—I get so tired and go all to pieces, and my legs won't work.

Q. Have you ever been able to walk without your crutches for four or five minutes?

A. Indeed I haven't—not since I was hurt.

Q. Demonstrate to the jury how you walk with the crutches and how you might change at times.

A. My hardest work is getting up and down, and if I can get up this way I can take one crutch this way and I can take one crutch this way—under my arm this way—and if I am careful I can walk quite a ways, and I do all those kinds of stunts. This part of my hand gets awfully badly cramped on me, and I think when Mr. Heckman saw me I was doing something like this,—I remember down by the bakery, and my wife said, "Look out, now, you will fall." I can walk around this way, and if I tip over this way I go down. [148]

(Testimony of D. J. Gover.)

Q. Can you stand up without your crutches and straighten up?

A. Talk about straightening up. I cannot straighten up unless I get by something—I want to touch something, and I can stand that way just for a few minutes, but to take and walk or stand that way, gentlemen, I cannot do it.

Q. Mr. Heckman and Mr. Brown said that you pulled out some tobacco out of your pocket?

A. I don't use tobacco.

Q. How long has it been since you used tobacco?

A. I never used it very much. I think along in about '74 and '76 I used it very little—smoked a little, but it was on account of being in a barn and the boys would say, "Have a cigar—have a cigar," and I got to failing, so I said to the doctor, Doctor——, I was driving a team from the barn for the doctor, driving out a little ways, and I said, "What is the matter with me? I don't have any appetite." He said, "You are like me, you are smoking too much, and you better quit," and I did quit. I don't like tobacco—it makes me sick.

Q. And you haven't smoked any since that time?

A. I might have a little, but I haven't for years. It makes me sick—tobacco smoke.

Q. You stated, I think, that Mr. Heckman notified you he would not be responsible for your hotel bill after a certain date at the Stedman Hotel?

Mr. FAULKNER.—I object to that as not rebuttal, incompetent, irrelevant and immaterial, having

(Testimony of D. J. Gover.)

no place in the case at all, and simply taking up the time of the Court.

The COURT.—I think it has been gone into.

Mr. ZIEGLER.—I think I asked him about that, but after talking with Mr. Gover the fact develops that he was informed by the proprietor of the hotel that he could not pay his bill after a certain date, and on that date he sent him a hotel bill for a week in advance. I think it is proper under the circumstances to explain that. I think Mr. Gover testified that Mr. Heckman himself told him, but it came to him in a different [149] manner—the proprietor of the hotel notified him, and I think it is a matter that should go to the jury.

The COURT.—He may correct his statements.

Q. Mr. Gover, did Mr. Heckman tell you he would not pay your hotel bill?

A. I understood he—

Q. I mean did he tell you personally?

A. Yes.

Mr. FAULKNER.—The same objection to that—it is incompetent, irrelevant and immaterial, and not rebuttal.

The COURT.—The objection is overruled. Of course my ruling was that he may correct his statement, explain what he meant by it, but I do not want to go into the whole question again.

Mr. ZIEGLER.—All right, your Honor,—I just want to clear that matter up, is all.

Q. Answer the question, Mr. Gover.

(Testimony of D. J. Gover.)

A. It came through Mr. Ferris. He says, "How about this hotel bill?"—

The COURT.—Just ask him the question—

Mr. ZIEGLER.—I think he is endeavoring to explain that.

The WITNESS.—I was coming to that but I had to say this other because I says to the clerk, "Where is Mr. Heckman? Will you point him out to me?" I saw him once before—talked a few minutes, but I didn't know the man—didn't believe I would know him if I would see him. In a little while he says, "There is Mr. Heckman," and I walked over and I said, "How do you do, Mr. Heckman? How about this—are you going to quit me?"—or something like that. "Well," he says, "the doctor says there ain't much the matter with you," and we talked a little while and he said, "We will send you down home." I said, "Well, I will have to see another doctor," I said, "there is something the matter with me." "Well," he says, "we will not pay it."—

The COURT.—He went all over that, in those exact words, on his examination in chief. [150]

Q. Now, just answer the question again, Mr. Gover,—I don't know whether you understood my point. Did Mr. Fred Heckman tell you personally that he would not pay your bill at the Stedman hotel,—did he speak those words to you?

Mr. FAULKNER.—Same objection to this question—not rebuttal, incompetent, irrelevant and immaterial.

The COURT.—The objection is overruled.

(Testimony of D. J. Gover.)

A. He said he couldn't do any more for me.

Q. He said he couldn't do any more for you?

A. Yes.

Q. I will ask you did you after that time pay your own hotel bill?

A. Yes, sir; the next day after that I did,—Mr. Ferris came to me the second time.

Q. He was the proprietor of the hotel?

A. Yes, sir.

Q. What did he say to you?

Mr. FAULKNER.—I object to what Mr. Ferris said to him as incompetent, irrelevant and immaterial, and not rebuttal.

Mr. ZIEGLER.—Well, it perhaps may not be, if the Court please, but it is simply a misunderstanding that has arisen, and it looks, the way the testimony has gone in, as if Mr. Gover was telling a falsehood about the matter, and I am now trying to clear it up and show how it took place. An old man is pretty liable to tell things and get mixed up, especially if he is injured, and I think it should be cleared up.

The COURT.—If the proprietor of the hotel told him it would not be material one way or the other in the case. It would not have been admitted to start with if the question had been what the proprietor of the hotel told him,—that would not be binding on the defendant.

Mr. ZIEGLER.—All right, your Honor, I will not pursue that line of questions any longer.

Q. Now, Mr. Gover, you heard Dr. Ellis say that

(Testimony of D. J. Gover.)

he went to your room one day and you were absent from the room and your crutches were there? [151]

A. Yes, sir.

Q. Will you explain that?

A. I think so, pretty easy. I went to Mr.—the drug-store—Mr. Ryus and got another pair of crutches, and I remember too that there was a man helped me out to the toilet one day—I had an accident and he helped me.

Q. What do you mean by an accident, Mr. Gover?

A. I couldn't hold my bowels, and something like a hemorrhage happened. I don't know who the man was, but he was right there in the next room, and he came and helped me out and back, and I was out to the toilet and washroom for probably half an hour or more.

Q. How far was that from your room?

A. Not very far because the clerk gave me a room back there as close as he could to the washroom and toilet on account of me being hurt—he gave me a room right close, and I only had a little ways to go and through open doors to the toilet.

Q. Now, Mr. Gover, I will ask if at any time you were at the hotel you ever went downstairs and out on the street without your crutches?

A. No, sir.

Mr. FAULKNER.—I object to that as not rebuttal—it is a repetition of the same story.

Mr. ZIEGLER.—I don't care to insist on it, your Honor.

Q. Now, Mr. Gover, have you ever suffered with

(Testimony of D. J. Gover.)

lumbago in your life before,—I mean suffered with lumbago at all? A. No, sir.

Q. Did you ever have any form of rheumatism?

A. Only in my arms a little,—that was in about '93, just for a little while, from working in the water with my hands.

Q. Now, what kind of work were you doing just before this time—before you went to work at the hatchery?

A. I had been working in the shipyards in Portland.

Q. How long did you work there? [152]

A. About 10 months.

Q. Did you miss any time?

A. No, sir; worked at nights.

Q. You worked at nights for about 10 months?

A. Yes, sir.

Q. What kind of work were you working on?

A. I was working in the Scotch Marine Boiler Works at the Willamette Iron and Steel Works.

Mr. ZIEGLER.—That is all.

Cross-examination.

(By Mr. FAULKNER.)

Q. You told us on your direct examination that you had been prospecting just before you went up there.

A. I went out with my nephew, yes, sir, and went up *the and* stayed up there probably a week. I just went through there on a visit to see my sister and her folks, and him and I, he taken the car and we

(Testimony of D. J. Gover.)

went up there prospecting, and then we were talking to a man and he talked about the Rainy Hollow District up here in Alaska, so we pulled out pretty quick for that. He said, "How soon can you get ready?" I said, "Right away," and went back down to my home and come to Alaska.

Mr. FAULKNER.—That is all.

Mr. ZIEGLER.—Just one question I forget,—I will ask you if you have chopped any kindling out at the house since you got back.

Mr. FAULKNER.—I object to that as immaterial.

The COURT.—What does it rebut?

Mr. ZIEGLER.—It does not rebut anything particularly, your Honor.

The COURT.—Very well—do not ask it.

(Witness excused.) [153]

Testimony of Mrs. D. J. Gover, for Plaintiff (In Rebuttal).

Mrs. D. J. GOVER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ZIEGLER.)

Q. State your name. A. Mrs. D. J. Gover.

Q. How old are you, Mrs. Gover?

A. I am 59.

Q. Are you the wife of Mr. Gover there?

A. Yes, sir.

(Testimony of Mrs. D. J. Gover.)

Q. After Mr. Gover was injured where was the first that you saw him?

A. When he came back home.

Q. State whether or not Mr. Gover was suffering from rheumatism or lumbago at that time.

Mr. FAULKNER.—I object to that as not rebuttal and calling for a conclusion of the witness.

The COURT.—What does it rebut, Mr. Ziegler?

Mr. ZIEGLER.—Dr. Ellis testified, inferentially at least, that he thought Mr. Gover was afflicted with lumbago and rheumatism, and that was the main portion of his testimony, along that line—he felt quite sure of that. I want to show by this witness the true condition of Mr. Gover as she found him when he arrived home and how he has suffered since that time, and the various things that he suffered with. I think that rebuts the inference that Dr. Ellis has given by his testimony.

The COURT.—What is Dr. Ellis' testimony? It is his opinion—an expert's opinion as to what was the matter with Mr. Gover. Now, anything that rebuts that opinion—that shows that that was not his opinion, would be rebuttal, but anything that shows that that opinion is not well founded would not be rebuttal,—that is, would not be rebuttal of Dr. Ellis.

Q. Mrs. Gover, you have been with Mr. Gover since he arrived home and you came back up here with him? A. Yes, sir. [154]

Q. You, of course, have observed him around the house, and everything like that? A. Yes, sir.

(Testimony of Mrs. D. J. Gover.)

Q. State whether or not he is able to walk to any extent, even around the house, without his crutches.

A. No, sir; no, sir, he has not been.

Q. What happens if he tries to stand without his crutches?

A. Several times I would ask him if he wouldn't stand his crutches up and try, and he would go over backwards, and if I hadn't caught him a time or two he would have fell on his back, and a time or two he fell forward. I would like for him to walk without them,—I would like for him to try to walk without them.

Q. You want him to get well?

A. Yes, sir, I do.

Mr. ZIEGLER.—That is all.

Mr. FAULKNER.—No cross-examination.

(Witness excused.)

PLAINTIFF RESTS.

SURREBUTTAL.

**Testimony of G. F. Heckman, for Defendant
(Recalled in Surrebuttal).**

G. F. HECKMAN, upon being recalled as a witness on behalf of the defendant, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. FAULKNER.)

Q. At the time you saw Mr. Gover last Monday, when you said he was walking without his crutches, was Mrs. Gover with him? A. No.

Mr. FAULKNER.—That is all.

Mr. ZIEGLER.—No questions.

(Witness excused.)

DEFENDANT RESTS. [155]

(Whereupon at the close of the testimony and before the commencement of the arguments, counsel for the defendant made the following motion.)

Mr. FAULKNER.—The defendant now moves the Court to instruct the jury to find a verdict for the defendant in this case, on the ground that there has been no negligence shown and no liability on the part of the defendant to pay the plaintiff any damages, and the evidence, taken as a whole, could not be taken by twelve reasonable men except in one way, and that would be to find a verdict for the defendant.

The COURT.—The motion will be denied.

Mr. FAULKNER.—Allow us an exception, if the Court please. [156]

Defendant's Exhibit No. 1.

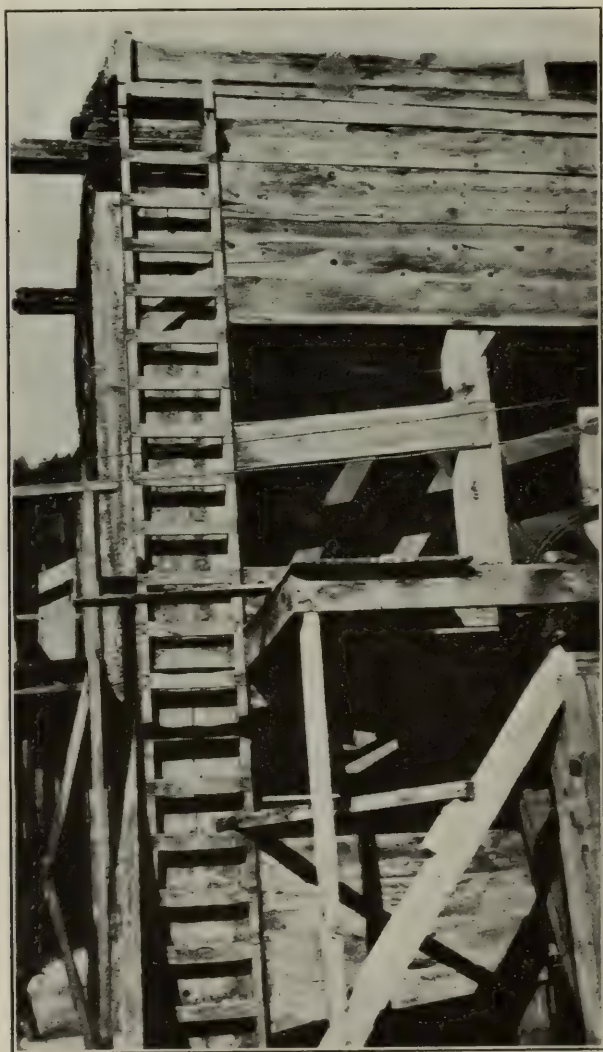
#2. Front view of ladder but going up a little higher than #1 but not quite so low.



[Endorsed]: Defts. Exhibit No. 1. Received in Evidence Dec. 3, 1920. In Cause No. 411-KA. J. W. Bell, Clerk. By —————, Deputy.

Defendant's Exhibit No. 2.

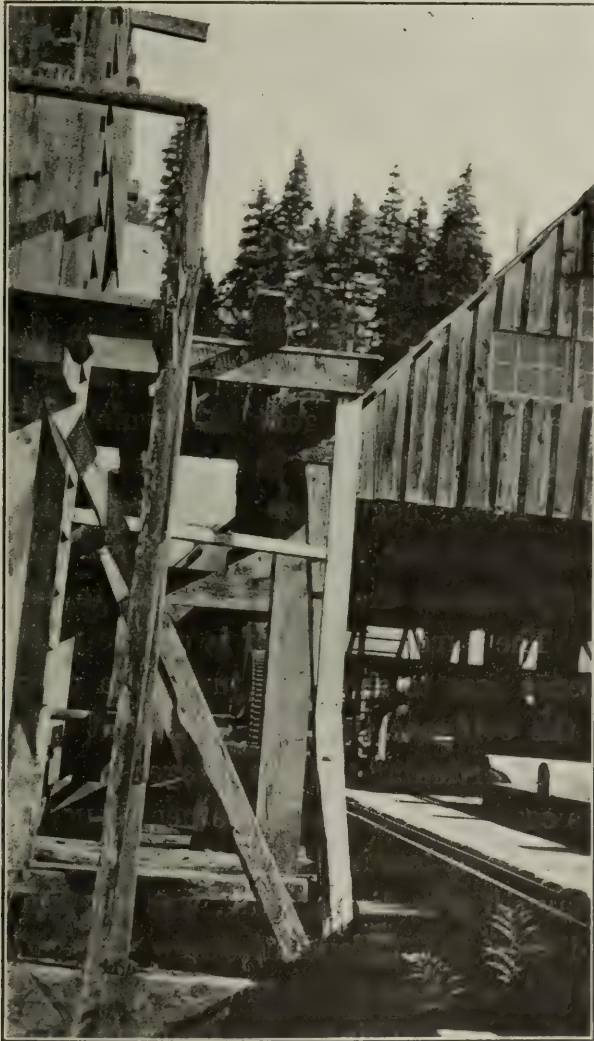
#3. Front view of ladder but not going as high as #1 & 2.



[Endorsed]: Defts. Exhibit No. 2. Received in Evidence Dec. 3, 1920. In Cause No. 411-KA. J. W. Bell, Clerk. By —————, Deputy.

Defendant's Exhibit No. 3.

#5. Side view of ladder but not going quite to top of flume but going lower than #4.



[Endorsed]: Defts. Exhibit No. 3. Received in Evidence Dec. 3, 1920. In Cause No. 411-KA. J. W. Bell, Clerk. By _____, Deputy.

Whereupon the defendant requested, in writing, that the Court give the following instructions:

INSTRUCTION No. I.

Gentlemen of the Jury:

You are instructed that if any witness in this case has wilfully testified falsely upon any material matter, you are at liberty to disregard his whole testimony, except in so far as his testimony may have been corroborated by other credible witnesses.

INSTRUCTION No. II.

Gentlemen of the Jury:

You are instructed that the plaintiff in this case bases his action upon negligence; that is, he alleges that defendant was negligent in furnishing him a defective ladder to be used in the course of his employment. Now, negligence is never presumed. You cannot presume that an employer was negligent simply because the plaintiff claims to have been injured. The burden of proof is on the plaintiff in a negligence case to show the jury by a preponderance of the evidence that the defendant was negligent in the particular that he alleges.

In this case, as I have said the negligence charged is that the ladder leading up to the top of the flume, which plaintiff was dismantling, was old and defective, and that the defendant knew this, and the plaintiff did not know it. A ladder is not like a complicated piece of machinery, or a complicated appliance; it is a very simple appliance, and the employee using the ladder is in the same position to ascertain its defects, if any exist, as the employer. The defendant is not bound to insure the safety of its em-

ployees at all hazards; it is simply obliged to use due care to see that the appliances with which the employee works, and the places where he works are reasonably safe; and in this case the defendant was under no obligation to plaintiff to make any particular examination or test of the ladder in question. [157]

INSTRUCTION No. III.

Gentlemen of the Jury:

You are instructed that the testimony in this case shows that the plaintiff at the time of the alleged accident, was engaged in dismantling a portion of an old flume and that under such circumstances an employer is not held to the same degree of care that it might be under the circumstances where a building might be in the course of erection, or where the employee was performing the duties in the regular course of the business of defendant.

The work of tearing down an old building or structure may involve certain risks which arise in the progress of the work, and which the employer cannot always anticipate and provide against. Therefore, the rule which makes it incumbent upon an employer to provide an employee with a reasonably safe place in which to work does not apply in such a situation.

Thompson on Negligent, sec. 3979 and sec. 4115.

INSTRUCTION No. IV.

Gentlemen of the Jury:

If you find in this case that there was any negligence on the part of the defendant but that the plaintiff himself was also negligent in any degree

whatever, your verdict must be for the defendant.
[158]

After arguments by the respective counsel, the Court instructed the jury as follows:

Instructions of Court to the Jury.

Gentlemen of the Jury:

This is an action brought by D. J. Gover, the plaintiff, against the Alaska Packers' Association, the defendant, for damages for an injury alleged to have been sustained by him on account of and through the negligence of the defendant company. In this kind of a suit—that is, a suit for damages for personal injury arising from negligence, brought by the employee against the employer—the law requires that the employee who brings the suit should set forth in his complaint wherein the negligence consisted, and that he should establish that negligence by what is called a preponderance of the evidence, and that if he does establish the negligence complained of by a preponderance of the evidence and also establishes by a preponderance of the evidence the damages that he has sustained, he is then entitled to recover those damages from the employer.

Now, in this case the plaintiff has set forth in his complaint that the negligence consisted as follows: He says that he was employed in and about the hatchery at Loring and that the defendant, his employer, directed him to dismantle an old flume constructed of boards, about 20 feet from the ground; that said flume was reached only by means of a stationary ladder running from the ground to the

flume; that while the plaintiff was actually engaged in the work he placed his right hand on the top rung of said ladder preparatory to descending to the ground; that while so descending the said rung broke loose and gave way, precipitating him violently to the ground, a distance of approximately 20 feet; that he landed on the ground beneath, striking with great force on his left hip, side and shoulder; that the rung that broke loose and gave way, and the timbers to which said rung was fastened by nails, were very old and rotten and wholly unsuitable and unfit for the purpose for which they were used; that the defendant—that is the company— [159] knew, or ought to have known, the condition of such rotten timbers, and that he, the plaintiff, did not know the condition of such rotten timbers; that it was the duty of the defendant to exercise ordinary care to keep the said ladder in reasonable repair, and that the defendant was negligent in failing to exercise that ordinary care to keep the ladder in reasonable repair,—so you will see that the whole gist of the action is the charge of negligence on the part of the defendant company.

The defendant company answers by saying that it was not negligent at all, and that the risk of being injured was a risk that was assumed by the employee, if there was any risk at all,—that it was assumed by the employee as one of the ordinary risks of the business—of the employment. The whole case, then, depends on the question as to whether there was or was not negligence.

Now, what is negligence? It has been most aptly

defined as the absence of that degree of care which under the circumstances an ordinarily prudent person would exercise.

Every man, unless he be a hermit living by his own labor on herbs and roots, absolutely cut off from his fellows, necessarily comes into contact with others, and that contact gives rise to certain reciprocal duties and obligations. In whatever relation one stands toward another, the law holds each of them to the exercise of that degree of care which an ordinarily prudent person would exercise under the circumstances. If either one fails to exercise that degree of care he is said to be negligent.

The expression "take care," or the "care of an ordinarily prudent person," means in the law that a person must be as careful as an ordinarily prudent man having due regard to the rights and welfare and safety of others would be under the circumstances of the particular case that is being inquired about.

The degree of care which an ordinarily prudent man would take so as not to inflict an injury upon another is different under different conditions. It may, and usually does, depend upon a variety of circumstances, such, for instance, as the relations between the [160] parties; the age, experience and capacity of him who has the right to demand the care; the nature of the business engaged in, and of the instrumentality used; and the likelihood of, and reason to apprehend, danger; and the ability or inability of the other party to appreciate the dan-

ger, or guard against it. Under some circumstances an ordinarily prudent man would be very careful indeed—he would be just as careful as he possibly could be—that is to say, he would exercise the highest degree of care. In such cases the very highest degree of care is only ordinary care, for that is the care which in that particular case an ordinarily prudent person would use. In other cases the circumstances may be such as not to call for the exercise of such a high degree of care; they may be such that an ordinarily prudent man would say, “there is little or no danger to be apprehended because whatever danger there is is perfectly patent, and the person I am dealing with has ability, experience and capacity to judge of such danger and to guard against it”; or he might say to himself, and it might be a fact, “the character of this thing is so well and so generally known that I can safely rely upon the common sense of all men dictating to them that they should not handle it—should not go near it.

For instance, if a poison should be exposed with notice or some indication to tell that it is poison—what might be an indication to a grown person might not be an indication to a person of tender years or immature experience.

Negligence, then, as before said, is simply want of proper care. It is the doing of that which an ordinarily prudent man would not do under the circumstances of the case, or it is the omitting to do that which an ordinarily prudent person would not omit to do under the circumstances of the case.

I have told you that the question of negligence de-

depends upon a variety of circumstances, and that among the circumstances to be considered in determining how much care it is incumbent upon one person to use towards another is the relation between the [161] parties. For instance: Suppose a chemist is making experiments with poisons and leaves a poison unguarded in the laboratory in which he is making the experiments, and suppose a person unwittingly takes some of the poison and suffers therefrom. Now, the fact that the chemist left the poison unguarded in any way might or might not be negligence (depending in large measure upon his relation to the injured party). It would be negligence in him so to leave his poisons if he had reason to apprehend that little children, not knowing anything about poisons, might wander into the laboratory and, attracted by something alluring in the appearance of the poisons, should be injured by reason of yielding to the usual curiosity and meddlesomeness of children; but it would not be negligence in the chemist to so leave his poisons unguarded if the only person at all liable to be in the laboratory or to handle said poison was an employee or assistant of the chemist who himself was well versed in poisons, knowing the appearance, characteristics and potency of the same.

Now, the relation between the plaintiff and the defendant in this case is the relation of master and servant. The defendant company employed the plaintiff to do some work in the dismantle of an old flume, the removal of timber therefrom, and the building of a fence out of the timber.

In the relation of master and servant there are certain circumstances under which the thing done by an ordinarily prudent person is so uniformly established that it has been crystallized into a principle of law that it is a legal duty to do that thing, so that it may be said that the duty of doing that particular thing is imposed by law. Now, one of the things required by law, in the relation of master and servant, is the furnishing to the servant by the master of the instrumentalities with which to do the things required of him, and the furnishing to the servant of a place wherein to do those things. It is the duty of the master to use ordinary care, the care of an ordinarily prudent person, to see that the appliances furnished to the employee wherewith to do [162] the work required of him are reasonably safe and adapted to the work, and it is the duty of the master to use reasonable care—ordinary care—to see that the place where the work is to be done is reasonably safe, and that the way of getting to the work or of leaving the work is reasonably safe. The master is not required to be absolutely sure that the place where the work is to be done is absolutely safe, but he must use reasonable care to see that the place is reasonably safe. The master is not an insurer against all accidents that may happen—the fact that an injury is received while an employee is at work for somebody does not give rise to the presumption that the master is negligent. Negligence is never presumed—it must be proven. The negligence that must be proven when the charge is that the place where the work was to be done is not safe or the ap-

pliance is not safe—the negligence that must be proven is this: the plaintiff must prove that the master did not exercise ordinary care—reasonable care—under the circumstances to see that the place where the work was to be done was reasonably safe. It is not required that the master must be absolutely sure that the appliances are absolutely safe. If the master uses proper care to see that the appliances are and are kept reasonably safe—that is, reasonably safe having due regard to the nature of the work and to the dangers which might be reasonably apprehended under the circumstances to a man of the intelligence, experience and capacity of the servant—if the master has done those things—if he has been that careful—if he has exercised the care of an ordinarily prudent person to see that the *work* where the *place* was to be done was reasonably safe, then the master has done his duty and cannot be chargeable with negligence.

If the appliances and the circumstances under which the work was done, the place in which the work was done, are of such nature as in the judgment of the jury an ordinarily prudent man would inspect from time to time in order to discover defects, and if, in this case, the master did not inspect, and if an inspection would have revealed a defect and if that defect caused the injury, why, then, ordinary care would not have been observed. In other words, [163] to make it plainer to the jury, if the jury believes that an ordinarily careful man, prudent man, would not only have put up a good ladder in the first place, but would have inspected it from time to time,

then they can hold the defendant to the duty of inspecting,—the duty of inspecting would be what an ordinarily prudent and careful man would do, if the jury thinks it was required. Some things would not have to be inspected at all—some things would have to be inspected more than others—some things would have to be inspected oftener than others,—it would all depends entirely upon what the thing was—what the circumstances were—as to whether an inspection from time to time would be a part of ordinary care or a part of extraordinary care. It is the duty of the master to exercise reasonable care to furnish a reasonably safe place.

Now, if the jury thinks that in this case reasonable care included the duty of inspecting from time to time, why, then the defendant would be held to that duty—would be held to the duty of inspecting. If the jury thinks that under the circumstances of the case an ordinarily prudent man would not have gone to any more trouble in inspecting this ladder than the defendant went to, then the defendant would not be required to inspect any more than it did,—it is a matter entirely for the jury to decide whether or not the defendant did anything with reference to this ladder that an ordinarily prudent person would not do, or whether it omitted to do anything that an ordinarily prudent person under the circumstances would not have omitted to do.

The plaintiff alleged in his complaint that the ladder was old and rotten and wholly unsuitable and unfit for the purpose for which it was used, and that the defendant knew, or ought to have known, its

condition. You have heard the evidence as to the age of the ladder; you have heard the evidence as to the liability of wood to decay; you have heard all the facts and circumstances related to you on both sides—it is for you to determine what are the facts and circumstances,—it is for you to determine how old [164] the ladder was; what the likelihood of its decaying was, and whether or not a reasonable and prudent person would have inspected the ladder by tapping it or in any other way, in addition to what the defendant says it did in inspecting the ladder by looking at it,—it is for you to say whether any other inspection was called for under the circumstances and whether any other inspection would have revealed any defect.

Now, one of the defenses is that the servant, Mr. Gover, assumed the risk. Now, the law about assumption of the risk by an employee is simply this, the employee has a right to assume that his employer has used ordinary care to see that the appliance that he is to do the work with, or the place in which he is to do the work, is reasonably safe, but any other risk over and above that that is naturally inherent in the business and that is open and obvious to the employee, the employee assumes. In other words, after the master has done his duty, the employee assumes all other risks that are obvious and known to him, or could have been known to him by reasonable diligence. He does not assume the risk of the employer's negligence,—the employer has no right to be negligent, if you understand thoroughly what negligence means as I have attempted to ex-

plain to you. The employee has a right to assume that the employer has not been negligent, and has a right to assume that the employer has used ordinary care to see that the place where the work is to be done is reasonably safe,—that is what is meant by assumption of the risk.

You are the sole judges of the testimony in this case, the credibility of the witnesses, and the inferences that are to be drawn from the testimony. You make up your mind what witnesses are to be believed when they tell you a thing in court very much the same as you do when they tell you anything in every day life,—you size them up; you take into consideration their demeanor, their candor or lack of candor, their ability to know of the things that they testify to, their inclination or disinclination to tell the truth and the whole *truty*; consider how they stood cross-examination; [165] consider whether their testimony is reasonable and probable, and comports with other testimony in the case that you believe; consider whether they have any interest in the result of the thing that they are telling you. or the impression they are seeking to make upon you,—you would not necessarily disbelieve a witness or a person simply because he had some interest in the matter, but you would consider what that interest was and whether or not it affected his testimony, and if so how much it affected it—you would throw that interest into the scales, and you would weigh the whole thing. You are not to count the number of witnesses,—by that I mean that you do not judge by the number of witnesses, but you judge by the weight of the testi-

mony—by the probability and reasonableness of the testimony, and how it comports with common sense and common observation and experience.

The burden of proof in this case is upon the plaintiff. The plaintiff must produce what is called a preponderance of the testimony to the effect that the defendant was negligent. Preponderance of testimony means the greater weight of the testimony—more convincing testimony,—the plaintiff must have more convincing testimony that the defendant was negligent than the defendant would have to produce that it was not negligent, because the plaintiff is the one who brings the suit and he must prove his case to the jury by what is called the preponderance of testimony. He does not have to prove it as the Government has to do in criminal cases—that is to say, he does not have to prove it beyond a reasonable doubt, but he does have to prove it by a preponderance of the testimony, which does not mean necessarily counting the witnesses—it means the weight of the testimony.

If any witness in the case has wilfully testified falsely as to any material matter, you are at liberty to disregard his entire testimony except insofar as it is corroborated by other testimony that you do believe.

You are not to decide the case on prejudice or on sympathy. If the plaintiff has been injured through the negligence of the [166] company, he is entitled to be compensated therefor; if he has not been injured through the negligence of the company you should not allow him anything simply because you

feel sympathy for him. You should have no prejudice against the defendant because it is a corporation,—your verdict should not be influenced by sympathy because you may think that the plaintiff has suffered. It is a matter for you entirely to decide on the evidence as to whether or not the defendant is guilty of negligence and whether that negligence has caused an injury, and if so, how much of an injury.

If you decide in favor of the defendant there will be one form of verdict, “We, the jury, find in favor of the defendant.” If you find in favor of the plaintiff you will assess the amount of his recovery. If you find for the plaintiff you should allow him compensation for the natural and probable consequences of the negligence, if you find negligence, and of course you must find negligence if you find for the plaintiff, because the action is founded on negligence. These damages would include such as are natural and probable consequences of the injury received,—such sum as in your judgment would compensate him for the pain and suffering that he has endured, if any, and you must take into consideration, if you reach that point in your deliberations, you may take into consideration the question as to whether the injury is permanent or temporary, his age, how much longer he would naturally have to live, and arrive as best you can at the pecuniary equivalent for the damage that he has suffered, if you find that he has suffered any.

In speaking of inspection, I think I instructed you it was a question for you to decide whether or not

the inspection as testified to by the defendant—his going up there and looking at it—was sufficient. I did not mean by that to charge you that that was the only inspection that the defendant claimed to have made. You will consider what it did say as to what inspection it made,—whether it made other inspection besides simply looking at it, [167] or whether it confined its inspection, if it made any, to simply looking at it,—it is a question for you to determine if it inspected it by looking at it or by putting his weight on it, or in any other manner,—it is for you to say whether any inspection that Mr. Patching did make was such as an ordinarily reasonable and prudent man would make under the circumstances, if the circumstances were such as to call for any inspection at all,—that is all a matter for you to determine, whether inspection was called for by an ordinarily prudent man, and whether an ordinarily prudent man would have made any more inspection than the defendant made, if it made any inspection—those are all matters for you to consider in determining what an ordinarily prudent and careful person would have done under the circumstances.

Whereupon the defendant excepted to the instructions of the Court as follows:

Mr. FAULKNER.—If the Court please, I think the Court should instruct the jury that in order for the plaintiff to recover they must find that if any accident happened through the negligence of the defendant it happened in the manner described by the plaintiff.

The COURT.—I think I have instructed them to that effect.

Mr. FAULKNER.—That is, there would be no room for conjecture or speculation as to whether he might have fallen in some other manner or some other place or was injured in some other way,—that is the sole testimony.

The COURT.—I thought I had instructed as to that but I will make it plainer: that they must find that the negligence was the negligence alleged in the complaint.

Mr. FAULKNER.—And that he fell the distance testified to and in the manner testified to.

The COURT.—Oh, no, I do not think he would have to show that. He would have to show that the injury arose from the negligence alleged but the fall might not have been exactly as he said. [168]

Mr. FAULKNER.—I mean there couldn't be any variation in the distance. There is only one line of testimony of the distance that he fell and they must find that to be a fact.

The COURT.—That is all a question of whether he received the injury.

Mr. FAULKNER.—The defendant excepts to the Court's refusal to give the second paragraph of instruction No. 2 requested by the defendant, where it defines a ladder not like a piece of complicated machinery.

The COURT.—I think I have given all that except that one clause. I don't think I could give it just as you have it there.

Mr. FAULKNER.—We further except to the

Court's failure to give instructions 3 and 4 requested by defendant.

The COURT.—I cannot give No. 4 on account of the fact that it is not pleaded.

Mr. FAULKNER.—Yes, I think it is. I think we have plead that—that if any negligence existed it was—

The COURT.—Contributory negligence is not pleaded. You plead that if there was an accident it was due solely to the negligence of the plaintiff. That is another way of saying that defendant was not negligent.

Mr. FAULKNER.—Does it have to be plead?

The COURT.—It does not have to be alleged but the denial pleads it. I have stated to the jury that unless they find negligence of defendant the plaintiff cannot recover.

Whereupon the jury retired for deliberation, and thereafter, to wit, on the 5th day of December, 1920, returned into court the following verdict, to wit:

“In the District Court for the District of Alaska,
Division No. 1, at Ketchikan.

No. 411-KA.

D. J. GOVER,

Plaintiff,

vs.

ALASKA PACKERS' ASSOCIATION,

Defendant.

VERDICT.

We, the jury duly empanelled and sworn in the

above-entitled cause, find for the plaintiff and assess the amount of his recovery at \$Ten Thousand (\$10,000).

E. F. UNDERHILL,
Foreman." [169]

And thereafter, to wit, December 6th, 1920, the defendant filed a motion for judgment for defendant, as follows:

"In the District Court for the District of Alaska,
Division No. 1, at Ketchikan.

No. 411-KA.

D. J. GOVER,

Plaintiff,

vs.

ALASKA PACKERS' ASSOCIATION, a Corpor-
ation,

Defendant.

Motion for Judgment for Defendant.

Comes now the defendant, by its attorney, and moves the Court to enter judgment herein for the defendant, and set aside the verdict of the jury, for the reason that the verdict is contrary to the law and the evidence, and that there is no evidence to sustain a verdict in favor of the plaintiff.

H. L. FAULKNER,
Attorney for Defendant."

Which motion for judgment for defendant was denied by the Court, to which ruling the defendant then and there excepted.

That thereafter, within the time allowed by law, to wit, on the 6th day of December, 1920, the defendant filed a motion for a new trial as follows, to wit:

“In the District Court for the District of Alaska,
Division No. 1, at Ketchikan.

No. 411-KA.

D. J. GOVER,

Plaintiff,

vs.

ALASKA PACKERS' ASSOCIATION, a Corporation,

Defendant.

Motion for New Trial.

Now comes the defendant, by its attorney, and moves the Court to set aside the verdict of the jury herein and grant it a new trial of this cause, upon the following grounds, to wit: [170]

I.

The Court erred in overruling and refusing to grant the defendant's motion for a nonsuit.

II.

The Court erred in refusing to direct a verdict in favor of the defendant.

III.

The Court erred in instructing the jury regarding the measure of damages; and in failing to submit to the jury proper standard by which to compute the damage.

IV.

The Court erred in refusing to instruct the jury that in order for them to find for the plaintiff, they must believe that the accident, if any, occurred in the exact manner testified to by the plaintiff.

V.

The verdict of the jury is contrary to the law and the evidence and was returned in palpable disregard of the evidence and instructions of the Court; and must have been based upon sympathy or prejudice.

VI.

The verdict of the jury is excessive and not based upon the law or the evidence.

VII.

The court erred in refusing to give the second paragraph of instruction No. 2 requested by defendant, and in refusing to give instructions 3 and 4, requested by defendant.

H. L. FAULKNER,

Attorney for Defendant."

That thereafter, on the 14th day of May, 1921, the Court denied the defendant's motion for a new trial, as follows:

"I have gone over the record in this case and I do not find any substantial reason for granting a new trial thereof. [171] While the evidence was not any too strong, yet I am clearly of the opinion that it was sufficient to go to the jury. That being the case, and the jury having found for the plaintiff, I feel that their verdict ought not to be disturbed.

Accordingly, the motion for a new trial is denied."

To which ruling the defendant excepted, and the exception was allowed. [172]

United States of America,
Territory of Alaska,—ss.

THIS IS TO CERTIFY that on the 3d day of June, 1921, the foregoing bill of exceptions was duly presented to me, the Judge of the above-entitled court before whom the above-entitled cause was tried, same being within the time allowed by me within which to present a bill of exceptions, and now, on motion of defendant, I do hereby settle and allow said bill of exceptions and order that the same be made a part of the record herein; and I further certify that said bill of exceptions contains all the evidence and exhibits adduced by both parties at the trial, and is in all respects a full, true and proper record of the proceedings herein.

Done in open court, at Ketchikan, Alaska, this 3d day of June, 1921.

ROBERT W. JENNINGS,
Judge.

O. K.—A. H. ZIEGLER,
Atty. for Pltff.

Filed in the District Court, District of Alaska,
First Division. June 3, 1921. J. W. Bell, Clerk.
By L. A. Green, Deputy [173]

In the District Court for the District of Alaska,
Division Number One, at Ketchikan.

No. 411—KA.

D. J. GOVER,

Plaintiff,

vs.

ALASKA PACKERS' ASSOCIATION, a Corpora-
tion,

Defendant.

Judgment.

This cause came regularly on for trial on the 1st day of December, 1920, the plaintiff appearing in person and by his attorneys, Messrs. Ziegler & Gore, and the defendant appearing in person and by its attorney, H. L. Faulkner, Esq. A jury consisting of twelve qualified citizens of the United States of America and residents of the Territory of Alaska, was duly empaneled and sworn to try said action. Witnesses on behalf of plaintiff and defendant were sworn and examined and thereafter, having heard the evidence, the arguments of counsel and the instructions of the Court, the jury retired to consider their verdict and subsequently returned into court and filed with the clerk their verdict, which was for the plaintiff and against the defendant and in the words and figures as follows, to wit:

In the District Court for the District of Alaska,
Division Number One, at Ketchikan.

No. 411—KA.

D. J. GOVER,

Plaintiff,

vs.

ALASKA PACKERS' ASSOCIATION, a Corpo-
ration,

Defendant.

Verdict.

We, the jury duly empaneled and sworn in the above-entitled cause, find for the plaintiff and assess the amount of his recovery at \$10,000.00.

E. F. UNDERHILL,

Foreman.

Thereafter, and within the time allowed by law, the defendant made and filed its motion for a new trial, which said motion was, after argument by counsel and due consideration by the Court, denied, to which ruling of the Court the defendant excepted.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the [174] plaintiff, D. J. Gover, do have and recover of and from the defendant, Alaska Packers' Association, a corporation, the sum of Ten Thousand Dollars (\$10,000.00), with interest thereon at the rate of 8% per annum from the date hereof until paid, together with his costs and disbursements herein expended taxed by the clerk.

Dated at Ketchikan, Alaska, this 17th day of May, 1921.

ROBERT W. JENNINGS,
Judge.

To the signing of the foregoing the defendant is allowed an exception and is allowed 40 days from this 14th day of May, 1921, to prepare and file a bill of exceptions herein, and during said 40 days' execution on the above judgment is hereby stayed, upon the filing of a bond by defendant in the sum of \$11,000.00.

ROBERT W. JENNINGS,
Judge.

O. K. as to form.

H. L. FAULKNER,
Atty. for Deft.
By A. G. SHOUP.

Filed in the District Court, District of Alaska, First Division. May 17, 1921. J. W. Bell, Clerk.
By _____, Deputy.

Entered Court Journal No. D, page 35. [175]

In the District Court for the District of Alaska,
Division No. One, at Ketchikan.

No. 411—KA.

D. J. GOVER,

Plaintiff,

vs.

ALASKA PACKERS' ASSOCIATION, a Corpo-
ration,

Defendant.

Bond for Stay of Execution.

KNOW ALL MEN BY THESE PRESENTS: That we, the Alaska Packers' Association, a corporation, doing business in Alaska, as principal, and J. R. Heckman, as surety, are held and firmly bound unto the above-named D. J. Gover in the sum of Twelve Thousand Dollars (\$12,000.00), to be paid to the said D. J. Gover, for which payment, well and truly to be made, we bind ourselves and each of us and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed this 17th day of May, 1921.

The condition of the above obligation is such that whereas a judgment was entered on the 17th day of May, 1921, in the above-entitled court and cause in favor of the plaintiff, D. J. Gover, and against the defendant, Alaska Packers' Association, a corporation, in the sum of Ten Thousand (\$10,000.00) Dollars; and, whereas the said defendant desires to sue out a writ of error to the United States Circuit Court of Appeals for the 9th Circuit to reverse said judgment, and whereas an order has been issued to stay execution on said judgment for a period of forty days:

NOW, THEREFORE, if the above-bounden Alaska Packers' Association, a corporation, shall prosecute said writ of error to effect, and answer all costs and damages which might accrue to the said plaintiff, D. J. Gover, by virtue of said stay of [176] of execution, then this obligation shall

be void; otherwise the said shall be in full force and effect.

ALASKA PACKERS' ASSOCIATION.

By H. L. FAULKNER,
Its Attorney and Agent,
Principal.
J. R. HECKMAN,
Surety.

O. K. as to form.

A. H. ZIEGLER,
Atty. for Pltff.

United States of America,
Territory of Alaska,—ss.

I, J. R. Heckman, being first duly sworn, depose and say: That I am a resident of the Territory of Alaska, Division Number One; that I am not an attorney nor counselor at law, marshal, deputy marshal, clerk of any court, or other officer of any court; and that I am worth the sum of Twelve Thousand Dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

J. R. HECKMAN.

Subscribed and sworn to before me this 17th day of May, 1921.

[Notary Seal]

ARTHUR G. SHOUP,
Notary Public for Alaska.

My commission expires May 16, 1925.

Approved May 17th, 1921, and stay granted.

ROBERT W. JENNINGS,

Judge.

O. K. as to form.

Attorney for Plaintiff.

Filed in the District Court, District of Alaska,
First Division. May 17, 1921. J. W. Bell, Clerk.
By V. F. Pugh, Deputy. [177]

In the District Court for the District of Alaska,
Division No. One, at Ketchikan.

No. 411-KA.

D. J. GOVER,

Plaintiff,

vs.

ALASKA PACKERS' ASSOCIATION, a Corpo-
ration,

Defendant.

Petition for Writ of Error.

Alaska Packers' Association, a corporation, the defendant herein, conceiving itself aggrieved by the final judgment of the Court entered herein on May 17th, 1921, and having filed its assignments of error herein, prays the Court to allow it a writ of error from the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, and to fix the amount of security which it shall give as a supersedeas to said judgment on such writ of error.

H. L. FAULKNER,
Attorney for Defendant.

Writ of error allowed. Supersedeas bond fixed at \$12,000.00.

Dated this 3d day of June, 1921.

ROBERT W. JENNINGS,
Judge.

Service admitted June 3, 1921.

A. H. ZIEGLER,
Attorney for Plaintiff.

Filed in the District Court, District of Alaska,
First Division. Jun. 3, 1921. J. W. Bell, Clerk.
By V. F. Pugh, Deputy. [178]

In the District Court for the District of Alaska,
Division No. One, at Ketchikan.

No. 411-KA.

D. J. GOVER,

Plaintiff,

vs.

ALASKA PACKERS' ASSOCIATION, a Corpo-
ration,

Defendant.

Assignment of Errors.

Now comes the defendant and assigns the following errors committed by the trial Court during the progress of the trial of this cause, and in the rendition of the final judgment, and upon which the defendant will rely in the Appellate Court for a reversal.

I.

The Court erred in overruling and refusing to grant the defendant's motion for a nonsuit.

II.

The Court erred in refusing to direct a verdict for the defendant at the close of all the evidence.

III.

The Court erred in instructing the jury regarding the measure of damages and in failing to submit to the jury a proper standard by which to compute the damages, if any.

IV.

The Court erred in overruling defendant's motion to set aside the verdict and grant a new trial herein.

V.

The Court erred in overruling the motion of the defendant for judgment for the defendant.

And for said errors and others manifest of record, defendant prays that the judgment be reversed herein and the cause remanded.

H. L. FAULKNER,

Attorney for Defendant.

Service admitted June 3, 1921.

A. H. ZIEGLER,

Attorney for Plaintiff.

Filed in the District Court, District of Alaska,
First Division. Jun. 3, 1921. J. W. Bell, Clerk.
By V. F. Pugh, Deputy. [179]

In the District Court for the District of Alaska,
Division No. One, at Ketchikan.

No. 411-KA.

D. J. GOVER,

Plaintiff,

vs.

ALASKA PACKERS' ASSOCIATION, a Corpo-
ration,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States to the Judges of
the District Court of Alaska, Division Number
One, GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is be-
fore you, wherein D. J. Gover is plaintiff, and
Alaska Packers' Association, a corporation, is de-
fendant, a manifest error hath happened to the great
damage of the said Alaska Packers' Association, a
corporation, as by its petition doth appear.

We being willing that error, if any hath happened,
shall be duly corrected and speedy justice done to
the parties in that behalf, do command you, if judg-
ment be given therein, that then under your seal
distinctly and openly you send the record and pro-
ceedings aforesaid with all things pertaining thereto
to the United States Circuit Court of Appeals for
the Ninth Circuit in the City of San Francisco,
State of California, so that you have the same before

our said Court on or before thirty days from the date hereof, that the record and proceedings aforesaid, being [180] inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what *if* right, according to the laws and customs of the United States, should be done.

WITNESS the Honorable _____, Chief Justice of the United States, and the seal of the District Court of Alaska, Division Number One, affixed at Ketchikan this 3d day of June, 1921.

[Seal]

J. W. BELL,

Clerk.

By _____,

Deputy.

Allowed June 3, 1921.

ROBERT W. JENNINGS,

Judge.

Services admitted June 3, 1921.

A. H. ZIEGLER,

Attorney for Plaintiff.

Filed in the District Court, District of Alaska, First Division. Jun. 3, 1921. J. W. Bell, Clerk.
By V. F. Pugh, Deputy. [181]

In the District Court for the District of Alaska,
Division No. One, at Ketchikan.

No. 411-KA.

D. J. GOVER,

Plaintiff,

vs.

ALASKA PACKERS' ASSOCIATION, a Corpo-
ration,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, Alaska Packers' Association, a corpora-
tion, as principal, and J. R. Heckman, of Ketchikan,
Alaska, as surety, are held and firmly bound unto
the above-named D. J. Gover, plaintiff, in the sum
of Twelve Thousand Dollars (\$12,000.00), for which
payment, well and truly to be made, we bind our-
selves, our heirs, executors, administrators, succes-
sors and assigns, jointly and severally, firmly by these
presents.

The condition of the above obligation, however, is
such that whereas the above-bounden Alaska Packers'
Association has sued out a writ of error in the
above-entitled cause from the United States Circuit
Court of Appeals for the Ninth Circuit to reverse
the judgment rendered in said cause on the 17th day
of May, 1921.

Now, if the said Alaska Packers' Association shall
prosecute its writ of error to effect, and pay all such

damages and costs as may be awarded against it if it fail to make good its plea, then this obligation shall be null and void; otherwise to remain in full force and effect.

Dated at Ketchikan, Alaska, June 3d, 1921.

ALASKA PACKERS' ASSOCIATION, a
Corporation.

, By H. L. FAULKNER,
Its Agent and Attorney in Fact,
Principal.
J. R. HECKMAN,
Surety. [182]

United States of America,
Territory of Alaska,—ss.

I, J. R. Heckman, whose name is subscribed to the foregoing bond as surety thereon, being first duly sworn, depose and say: That I am a resident and property owner of the Territory of Alaska, Division Number One, and not an Attorney nor Counselor at Law, Marshal, Deputy Marshal, Clerk of any Court nor other officer of any Court, and that I am worth the sum of Twenty-four Thousand Dollars (\$24,000.00) over and above all my just debts and liabilities, exclusive of property exempt from execution.

J. R. HECKMAN.

Subscribed and sworn to before me this 3d day of June, 1921.

[Notary Seal]

ARTHUR G. SHOUP,
Notary Public for Alaska.

My commission expires May 16, 1925.

Approved to operate as a supersedeas from the filing thereof.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska,
First Division. Jun. 3, 1921. J. W. Bell, Clerk.
By V. F. Pugh, Deputy. [183]

In the District Court for the District of Alaska,
Division No. One, at Ketchikan.

No. 411-KA.

D. J. GOVER,

Plaintiff,

vs.

ALASKA PACKERS' ASSOCIATION, a Corpo-
ration,

Defendant.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States to D. J. Gover
and to Messrs. A. H. Ziegler and L. O. Gore,
His Attorneys, GREETING:

You are hereby cited and admonished to be and
appear in the United States Circuit Court of Ap-
peals for the Ninth Circuit to be holden in the City
of San Francisco, State of California, within thirty
days from the date of this writ pursuant to a writ of
error in the clerk's office of the District Court for
Alaska, Division Number One, in a cause wherein

Alaska Packers' Association, a corporation, is plaintiff in error, and you defendant in error, and then and there to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

WITNESS the Honorable _____, Chief Justice of the United States, this 3d day of June, 1921.

ROBERT W. JENNINGS,

Judge.

Service admitted June 3, 1921.

A. H. ZIEGLER,

Attorney for Defendant in Error.

Filed in the District Court, District of Alaska, First Division. Jun. 3, 1921. J. W. Bell, Clerk.

By V. F. Pugh, Deputy. [184]

In the District Court for the District of Alaska,
Division No. One, at Ketchikan.

No. 411-KA.

D. J. GOVER,

Plaintiff,

vs.

ALASKA PACKERS' ASSOCIATION, a Corporation,

Defendant.

Praeipie for Transcript of Record.

To the Clerk of the District Court, Ketchikan,
Alaska.

You will please make up a transcript of the rec-

ord in the above-entitled cause, and include therein the following papers, to wit:

- 1st. Amended complaint.
- 2d. Answer to amended complaint.
- 3d. Reply.
- 4th. Motion for a new trial.
- 5th. Motion for judgment for defendant.
- 6th. Judgment.
- 7th. Bond on stay of execution.
- 8th. Bill of exceptions.
- 9th. Petition for writ of error.
- 10th. Assignment of errors.
- 11th. Order allowing writ.
- 12th. Writ of error.
- 13th. Bond on appeal.
- 14th. Citation.
- 15th. This praecipe.

Said transcript to be made up in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

H. L. FAULKNER,
Attorney for Defendant.

Filed in the District Court, District of Alaska,
First Division. Jun. 3, 1921. J. W. Bell, Clerk.
By V. F. Pugh, Deputy. [185]

In the District Court for the District of Alaska,
Division No. One, at Ketchikan.

No. 411-KA.

THE ALASKA PACKERS' ASSOCIATION, a
Corporation,

Plaintiff in Error,

vs.

D. J. GOVER,

Defendant in Error.

**Certificate of Clerk U. S. District Court to Transcript
of Record.**

United States of America,
District of Alaska,
Division No. 1,—ss.

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 185 pages of typewritten matter, numbered from 0 to 185, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the record, as per the praecipe, of the plaintiff in error, on file herein and made a part hereof, in the cause wherein The Alaska Packers' Association, a corporation, is plaintiff in error, and D. J. Gover is defendant in error, No. 411-KA, as the same appears of record and on file in my office, and that the said record is by virtue of the writ of error and citation issued in this cause, and the return thereof, in accordance therewith. I further certify that there is enclosed herewith defendants' original Exhibits Nos. 1, 2, 3 and 4.

I do further certify that the transcript was prepared by me, in my office, and the cost of preparation, examination, and certificate, amounting to eighty-three & 25/100 dollars (\$83.25), has been paid to me by counsel for plaintiff in error.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 15th day of June, 1921.

[Seal]

J. W. BELL,
Clerk. [186]

[Endorsed]: No. 3705. United States Circuit Court of Appeals for the Ninth Circuit. Alaska Packers' Association, a Corporation, Plaintiff in Error, vs. D. J. Gover, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed June 23, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3705

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA PACKERS ASSOCIATION

(a corporation),

Plaintiff in Error,

vs.

D. J. GOVER,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

H. L. FAULKNER,

CHICKERING & GREGORY,

Attorneys for Plaintiff in Error.

FILED

OCT 3 - 1921

F. D. MONCKTON,

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No. 3705

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA PACKERS ASSOCIATION

(a corporation),

Plaintiff in Error,

VS.

D. J. GOVER,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I.

STATEMENT OF FACTS.

This case comes to this court upon a writ of error to the United States District Court of the District of Alaska, Division Number One, directed to a judgment entered in favor of the plaintiff in the sum of ten thousand dollars. Throughout this brief we shall use the terms "plaintiff" and "defendant" as referring to the parties as they were aligned in the court below.

The action is one for personal injuries claimed to have been sustained by plaintiff under the following circumstances: the defendant, which is a

corporation engaged in the business of canning salmon and marketing its product, maintains a hatchery for the propagation of salmon located at a place 7 or 8 miles from Loring in Southern Alaska. The plaintiff in July, 1919, was employed by defendant to work at this hatchery, and he commenced work there on July 6th as a common laborer in and about the hatchery. His work was to cut wood and do general all-around work (p. 18). On April 19, 1920, and in the forenoon of that day, plaintiff was engaged in building a fence at the hatchery, and in the afternoon he was directed by Patching, the superintendent of the hatchery, to get some boards down from an old flume, which boards were to be used in repairing or building the fence. This flume had been constructed for the purpose of conducting water to run a small sawmill which the defendant had operated at one time. This sawmill was not in operation on April 19th, and had not been operated for a long time (pp. 94-96). The top of the flume near its terminal point was about twenty-five feet from the ground, and was reached by a vertical ladder. This ladder was constructed of uprights 2x6. The rungs or steps were 1x4, and were twenty-four inches long (p. 95). Each rung was fastened to the uprights with three spikes at each end, and the top rung of the ladder was twenty-five feet from the ground. At the bottom of the ladder there was a walk, made of three pieces of 4x8 timber, which led to a tramway seven feet and two

inches distant from the bottom of the ladder (p. 103). This tramway ran parallel to the flume.

The plaintiff testified (p. 22) that Mr. Patching told him to go up on the ladder and get a rope and a peavey to loosen the boards. Plaintiff did so and worked at this task until about a quarter to four of the afternoon. He ascended the ladder, pried off the boards on top, and then lowered the boards one by one to the ground (p. 43). In the case of each board he descended the ladder, removed the rope and re-ascended to lower another board. The plaintiff testified that he had been up and down the ladder at least three times. Patching testified that he must have been up and down the ladder at least seven times (p. 113) from the number of boards that had been removed from the flume. Plaintiff testified that as he was making the last of these descents, and while he had his feet on about the fourth rung from the top of the ladder, the top rung upon which his right hand rested pulled out, and that he fell backwards down to the ground, striking the edge of the tramway. It is for the injuries thus sustained that plaintiff sues. No bones were broken or sprains suffered, and no discoverable objective bruises resulted. At the time he fell plaintiff had no load, the boards having been lowered by the means of the rope, and therefore the use of his arms and legs in descending the ladder was unimpeded.

Plaintiff testified that he was very nearly paralyzed by the fall and could not use an arm or his legs, and (p. 28):

“I hurt so bad that I don’t think a man could hurt any worse,—I don’t see how he could.

“Q. Did you suffer much pain?

“A. Indeed I did.”

The only evidence introduced by the plaintiff as to the condition of the ladder was that given by the plaintiff himself, in which he said (p. 42.) that he noticed “a little board” was lying there after he fell to the ground; that the board was lying there and the nails were out, and that on one side he could see rotten wood between the spikes (p. 24). This was at the time when plaintiff claims he was suffering great physical pain and was very nearly paralyzed.

The defendant finds itself in an unfortunate position in regard to this case. There were no witnesses to the accident, and any proof of negligence rests on the evidence of the plaintiff alone. The extent of the injuries received is based upon plaintiff’s testimony as to his subjective symptoms. The amount of the verdict excites surprise when it is considered that the plaintiff was a man of sixty-eight years of age at the time the accident occurred, and that he had had uncertain employment, his earning capacity when working at the time of the accident \$3.85 a day and board. In addition to the excessive amount of the verdict the defendant is confronted with the peculiar nature of the testimony produced by plaintiff in order to establish his alleged injuries. Frequently cases arise where either the circumstances of the accident or the extent or nature of the injuries suffered must be established upon the testimony of the plaintiff alone.

It rarely happens, however, as it has in this case, that the defendant must face both these circumstances, for not only does the only evidence with regard to the facts of the accident rest upon the unsupported testimony of the plaintiff, but all of the testimony concerning the extent and nature of his injuries is based upon his self-diagnosis. None of the medical witnesses gave any testimony as to any substantial objective symptoms which could be traced to his fall, and plaintiff testified (p. 45) that there were no cuts—bones broken or bruises even except “a green spot”—He gave as an explanation that “he had on pretty considerable clothes” (p. 45).

The plaintiff, after the fall, remained over a month at the hatchery, notwithstanding that defendant’s superintendent frequently asked him if he desired to go to Ketchikan (p. 107), and if so, that he would take him out; that plaintiff said that he did not think it was necessary. When he did come out, which was about the first of June, 1920, he went to see Dr. Ellis, who testified (p. 130) as to the nature of plaintiff’s condition when he saw him. He testified (p. 131) that he found no evidence of external injury. The compensation of Dr. Ellis was paid by the defendant Association, and plaintiff continued to go to him until some time about July 1st or 2nd, when plaintiff of his own accord quit going to see him. Dr. Ellis testified that, in his opinion, it would have been impossible for a man of the age of plaintiff to fall the distance that he claims he fell, without breaking or dislocating some bones, or having a bruise or dis-

coloration. Dr. Mustard testified in plaintiff's behalf (pp. 65-79). He states that he made an examination about the first of July and found a reddish area looking like a recent contusion over the left sacral joint, and a point of considerable tenderness on the spinal column between the eleventh and twelfth dorsal vertebrae; that he had examined plaintiff since, and that at the present time the contusion was still marked by a round brownish pigmented area the size of perhaps a dollar; that the tenderness between the eleventh and twelfth vertebrae was quite marked, and that the large muscles of the buttocks on the right side were wasted and shrunk. It will be observed that the testimony of Dr. Mustard is practically wholly based upon the subjective symptoms of the plaintiff. His evidence as to any objective symptoms is the testimony as to the reddish area about the size of a dollar over the left sacral joint. He did not observe any fracture (p. 76) and when asked if it would be possible for a man of plaintiff's age to fall twenty-five feet and strike a hard substance such as a tramway without breaking a bone, he said (p. 76), "If I were betting, I would bet the other way."

This brief summary of the evidence will disclose that the facts of this case lie within a narrow compass and that the points at issue which are presented to this court are quite simple. Plaintiff, who had followed many desultory occupations, while of the age of sixty-eight years was employed to do general all-around work at this hatchery. The hatchery, its

buildings and equipment were of no complicated character, and the plaintiff worked there from July, 1919, until April, 1920, at general work. He claims to have been injured while descending a ladder attached to the flume. This ladder and flume was directly at the hatchery, and must have been thoroughly known to plaintiff during the eight or nine months of his work there. The ladder had been used frequently by other employes of the hatchery, and had been tested by Patching, the superintendent, just before the plaintiff started to take away these boards. After about two hours of work, plaintiff was found at the bottom of the ladder with the upper rung detached, and he claims that he was precipitated to the ground by reason of the rung breaking loose. He was given such attention as was possible under the circumstances, but no bruises, dislocations or breaks were discovered upon his body. Plaintiff remained at the hatchery, although defendant offered to take him out to Ketchikan if he so desired. During this time no bruises upon his body appeared. About six weeks after the accident plaintiff went down to Loring, and from there to Ketchikan. Arriving at the latter place, he consulted Dr. Ellis, who was the defendant's physician. Dr. Ellis testified that he could not find any bones broken, but that he thought the patient might be suffering from rheumatism. After treating with Dr. Ellis for some time the plaintiff left him and went to Dr. Mustard. This was on or about July 1st, two months and a half after the alleged accident. Dr. Mustard testi-

fied as to the contusion above referred to and the tenderness between the eleventh and twelfth dorsal vertebrae. Reasoning backward from the condition of the plaintiff as he found him, the Doctor testified that, assuming that the plaintiff had received the injury described, this injury might have been the cause of his internal condition as he found it (p. 70). The testimony of Dr. Mustard may be summarized to the effect that if the plaintiff were suffering from the internal symptoms which he, the patient described, then they might have been due to an injury to his spinal cord, and that this cord might have been injured without breaking any bones.

II.

THE DISTRICT COURT ERRED IN REFUSING TO GRANT THE REQUEST OF DEFENDANT FOR AN INSTRUCTED VERDICT (page 186), FOR THE REASON THAT THE LADDER WAS A SIMPLE TOOL, AND THE DANGERS GROWING OUT OF DEFECTS THEREIN, IF ANY, WERE ASSUMED BY THE EMPLOYEE.

We concede the general rule to be that an employer is bound to furnish his employee with a reasonably safe place in which to work, and to furnish him with reasonably safe tools and appliances. There is, however, a well-recognized exception to this rule to the effect that where the tools furnished are of a simple nature and the defects therein are

as easily discoverable by the servant as by the master, the master cannot be held liable for injuries which arise from such defects. No citation of authority is necessary to show this well-established exception to the rule.

Defendant requested (p. 190) an instruction as to this simple tool doctrine but this was refused and an exception noted (p. 205).

There are numerous cases which hold that this exception to the general rule applies to ladders, and, in many cases, decided in divers jurisdictions in this country, a ladder has been held to be a simple tool or appliance.

One of the first of these cases is *Cahill v. Hilton* (N. Y.), 13 N. E. 339. In that case the court reversed a judgment in favor of the plaintiff where it appeared that the accident occurred by reason of the collapse of a ladder, the court saying:

“A ladder, like a spade or hoe, is an implement of simple structure, presenting no complicated question of power, motion, or construction, and intelligible in all of its parts to the dullest intellect. No reason can be perceived why the plaintiff, brought into daily contact with the tools used by him, as he was, should not be held chargeable, equally with the defendants, with knowledge of their imperfections.”

Another instance of a reversal of a judgment under like circumstances is *Nosal v. International Harvester Co.*, 187 Ill. App. 411. In that case the

court held that where a ladder,—which is a simple and ordinary tool, the nature of which is easily understood—is used by a servant who is familiar with it, the servant in using the same is conclusively presumed to assume the risk of all defects therein, whether patent or latent, and whether the master knows of such defects, or could have known of them by the exercise of reasonable care, or not.

In *Sivley v. Nixon Mining Drill Co.* (Tenn.), 164 S. W. 772, the judgment for the plaintiff was reversed where the injury arose out of the use of a defective ladder supplied by the employer, the court saying:

“It has been ruled by courts, quite without exception, that an ordinary ladder falls within the class of simple tools in respect of a defect in which the employer is held not liable, on the ground that a defect in such a simple tool must be obvious to its user, by whom any risk of danger therefrom must be held to be assumed.”

The same rule is laid down in *Christy v. Southwestern Missouri Ry. Co.* (Mo.), 110 S. W. 694. The following language was used by the court in the opinion:

“But, be that as it may, he describes the ladder in such way as to show that its condition would have suggested to any one that it could not be used without imminent risk. His experience with it enabled him to know its condition better than anyone else. It was a simple appliance, so old, scarred and patched as to carry on its face a warning to the most thoughtless and indifferent.”

The following cases also deal with the classification of a ladder as a simple tool, and reach the same conclusion as the authorities above quoted:

McKay v. Hand (Mass.), 47 N. E. 104;

McGill v. Cleveland etc. Co. (Ohio), 86 N. E. 989;

Blundell v. Wm. A. Miller Elevator Mfg. Co. (Mo.), 88 S. W. 103.

In California, while the question of whether or not a ladder comes within the "simple tools" doctrine appears never to have been decided, it has been held that a scaffold somewhat in the nature of a ladder is governed by the same principles. That case was *McNamara v. Macdonough*, 102 Cal. 575. The Supreme Court of California approved the following instruction which had been given by the trial court:

"An employer who provides appliances, such as a scaffold, as in this case, must see that it is suitable and fit for the use for which it is intended. This rule is, however, subject to this limitation: That when a person works upon a platform or scaffold—as the plaintiff did in this case—and such platform or scaffold is insufficient for the purpose for which it is used, or for any reason unsafe or dangerous to work upon, and such person so uses it or works upon it with a knowledge, or means of knowledge, equal to that of the employer, that it is defectively constructed, unsafe, and dangerous to work upon, then, in that case, he takes the risk incident to such employment, and cannot recover against such employer for injuries sustained which arise out of accidents resulting from such defective, unsafe, and dangerous condition of such scaffold."

We have no doubt that counsel will cite in opposition to this contention the case of *Pacific Telephone & Telegraph Co. v. Starr*, 206 Fed. 157. It is very natural that this case should be cited because it is a decision of this court, and the question of whether or not a ladder is a simple tool or appliance is therein discussed. The plaintiff there was injured by the collapse of an improvised ladder which had been made by lashing together two smaller ladders borrowed from persons along the line of the defendant's telephone system. The work in which plaintiff was engaged for defendant was the construction and care of telephone wires, which necessitated the constant use of very *high* ladders. Ordinarily, such high ladders were furnished by the company, but there was not always a sufficient number of them available, in which case others were borrowed and if necessary spliced together. Plaintiff was precipitated to the ground by the breaking of a rung of an improvised ladder which rung was cross-grained. The jury's verdict was for the plaintiff, and the defendant, upon appeal, contended that the ladder in question was a simple tool or appliance, and that the employee, therefore, assumed the risk of its use. This court, in refusing to apply such doctrine to the facts established affirmed the judgment of the lower court. This affirmation is very clearly based upon two grounds, neither of which exists in the case at bar. First, is it recognized that a ladder may be a simple tool or appliance, the court saying:

“Counsel next insist that a ladder is a simple appliance—that is, of a class with the ordinary carpenter’s or mechanic’s tools—and that accidents occasioned by the use of such simple appliances are not actionable. Many authorities are cited in support of this proposition, but their application is not apparent, *when the nature of the work in which these men were engaged and the kind of ladders required for their service are taken into account.*”

Then it was said that because of the peculiar nature of the work which the plaintiff was engaged to perform, to wit: the constant use of ladders of an especial kind and design, which were necessary in the daily business of the company, the exception to the general rule did not apply, and that the particular ladders in question were not simple tools. Said this court:

“This required the use of ladders not of the ordinary kind, such as stepladders and short contrivances used about the house or by mechanics about their general work, but ladders of more than the ordinary length, and extension ladders calculated to reach high positions, which could be used with safety by men doing that character of work. *These are the kind of appliances, and not the simple or ordinary kind*, that the company was supposed to furnish for the use of the men engaged in the particular work in hand. And it was the attempt to supply a long ladder, one of unusual length, that led to the accident complained of. So it is not apparent that the doctrine sought to be invoked has application here.”

It thus appears that the Starr case is not controlling in that the facts disclose that the ladder there

used was not the ordinary simple contrivance which was used in the cases above referred to as establishing the doctrine of a ladder as being a simple tool or of the simple nature of the ladder used in the present case. To the contrary, this decision is persuasive in favor of the defendant here because it is, in part at least, based upon a lack of inspection by the defendant's foreman. The measure of care devolving upon the master is said to be

“reasonable care and precaution in furnishing to his employes reasonably safe tools and implements with which to do their work. The duty is not absolute to provide reasonably safe tools and implements, for he is not an insurer on that score, but to exercise reasonable care and forethought in providing such tools and implements as are reasonably suitable and safe for the work. When he has done this, he has discharged his bounden duty to his servants and employes. This duty imposes upon the master the responsibility of inspecting these instrumentalities to determine their safety, and here again he may be excused for a failure to discover defects, if he has been reasonably careful and diligent in making the inspection; but he is not to be excused in failure to make any inspection at all. If a tool or appliance is defective, and the defect is discoverable upon a careful scrutiny and examination, such as a reasonably prudent and careful man would make under like circumstances, the master would be at fault in furnishing such a tool or appliance to his workmen, and his failure to inspect could not help him. It would injure him, rather, as he would be guilty of a neglect of duty. *If, however, the defect was latent in character, and not ordinarily discoverable by reasonable inspection, then he could not be held accountable.* The duty to make the

inspection, however, would remain, though, if the defect was of that character that a reasonable inspection would not disclose it, there could, of course, be no liability for failing to inspect."

This brings us to the next point of argument upon which it is urged that the judgment below is erroneous, viz., that it does here appear, without contradiction, that an adequate inspection had been made of this ladder.

This was made by the superintendent of the hatchery himself upon the morning of April 19th immediately prior to plaintiff's first trip up to the flume. Mr. Patching at that time went all the way from the ground to the top of the flume, putting his weight on each rung, and discovered no weakness (see Tr. p. 96). That this was more than a mere inspection and was a real test in fact was shown in that Patching weighed at that time at least 220 pounds; and that he had personally been up and down this ladder many times prior to April 19, 1920.

Mr. Patching also testified that he had inspected the ladder in a like manner at numerous times before, and that it had been constructed of new lumber, under his supervision, only eight or nine years prior to the accident (see Tr. p. 117). He further testified that the entire ladder, including the rung which came off on April 19th, was in good condition at the time of the accident (p. 96).

Therefore, taking this uncontradicted testimony it is clear that adequate, not to say extraordinary,

inspection of the appliance was made, and the condition found to be good.

If, on the other hand, the testimony of plaintiff himself be looked to in this connection, it is equally clear that no liability can rightfully be fastened upon defendant, for the reason that if the condition of the ladder was such as he testified then the defects were such as he must be deemed to have *assumed*.

The condition of the record in this regard is unusual. In order to substantiate his case, the plaintiff sought to be *qualified and was qualified as an expert* in judging the age and strength of wood (p. 86). If he was such expert at the time of the trial, he must also have possessed like qualifications on the day that he was injured.

We thus have presented a case where a man who is an expert in a knowledge of the duration of usefulness and strength of spruce wood goes up and down this ladder in daylight a considerable number of times—it is immaterial whether it was three or seven times—and on his final trip down is injured by pulling out the top rung. That notwithstanding the fact that as he claims, he was “writhing in agony” at the bottom of the ladder, he was able casually to observe the rotten condition of the wood of the upright as it was disclosed by the fallen rung, which he saw on the ground. If while, as he says, he was practically paralyzed, the condition of the wood was so apparent that it impressed itself upon his mind at that critical time, then it is obvious that a

reasonably careful man, an expert in such matters, would have known the condition of this rung when in place and upon the occasions of his many actual uses of the ladder in the two hours preceding the accident. The plaintiff does not stand in the position of one who was ignorant of the risk of danger to which he was exposed. To the contrary, and as a part of his case in chief, he qualified, over the objection of the defendant, as an expert in this regard. He should have known, therefore, more than Patching or anyone else could have known of the danger. If, therefore, the defect in question was *patent* in character, the plaintiff must have observed it, or be deemed in law to have observed it. In such case it was his duty either not to ascend the ladder further until the defect had been remedied, or to have taken precautions against the rotten rung. The act of climbing a ladder such as this is one of the simplest operations possible. Plaintiff claims that his right hand only was on the rung which pulled off. Where was the left hand? His feet were firmly placed upon the fourth rung and did not slip. The slightest attention to his movements must have protected plaintiff, as a child of tender years would have been perfectly able to grasp another rung or the side of the upright instead of this alleged defective rung.

To the contrary, if the defect in this rung was *latent* in character and was not ordinarily discoverable by a reasonable inspection, then under the direct ruling in the Starr case, the master "could not be held accountable". It obviously was not neces-

sary that the defendant pry off each one of these rungs of the ladder to see if there were defects before any employee used it; such requirement would demand more than reasonable care. It is difficult to see what the defendant could have done in regard to this ladder that he did not do. Its superintendent had used it a short time before the accident; he and other employes had frequently used it in the past and, finally, the plaintiff himself had, by reason of his employment at the time, peculiar facilities for testing the ladder and observing its condition.

Plaintiff is therefore confronted with a dilemma. If the wood was as patently rotten as he claims, he as an expert on woods, should have noticed this and protected himself. If, however, the defect was merely latent, under the ruling in the Starr case, defendant was required only to make a reasonable inspection.

At the conclusion of plaintiff's case in chief (p. 79), defendant moved the court to dismiss the case and grant a nonsuit for the reason he had not established that the defendant was in any particular negligent, or that the accident—if an accident occurred—happened through any act of the defendant that would make it liable to him in any degree for damages. After this motion was made, the plaintiff, by permission of court, was recalled to the stand and testified. Thereupon the motion for a nonsuit (p. 92) was denied and exception noted. At the close of the testimony, defendant renewed this

motion (p. 186) and moved the court to instruct the jury to find a verdict for the defendant upon the ground that there had been no negligence shown. The ruling upon this motion is assigned as error. Later a motion for judgment for the defendant was made (p. 207) upon the ground that the verdict was contrary to the law and the evidence, and a motion for new trial was heard and denied.

This is not a case where the doctrine of *res ipsa loquitur* applies. That plaintiff may recover, he must affirmatively prove negligence on the part of the defendant. The mere fact that the rung came off the ladder does not prove such negligence. It was essential that, in addition to this fact, plaintiff prove that the defendant as employer had not made a reasonable inspection of the ladder or had reasonable grounds to believe that it was defective. The defendant in this case has proven without contradiction that he did make all the inspection which a reasonable man could be asked to make, and that if this defective condition of the ladder did exist that plaintiff must have been aware of it.

We submit that the trial court, in denying the motion for a new trial in this case, was indeed stating the matter mildly when it said that "the evidence was not any too strong"; and that the case should properly have been taken from the jury at the close of the testimony and a verdict directed in favor of defendant.

III.

THE JUDGMENT IN THIS CASE SHOULD BE REVERSED UPON THE GROUND THAT THE VERDICT OF THE JURY WAS EXCESSIVE.

The judgment upon which a writ of error is taken out in this case was in the sum of \$10,000. Plaintiff, at the time he was injured, was 68 years of age. The injuries claimed to have been suffered by him by reason of his fall, as has already been pointed out herein, were not serious, and the symptoms almost wholly subjective. Plaintiff was employed as a common laborer.

Under these circumstances, it is obvious that the jury, in awarding \$10,000 damages, could not have been seeking merely to compensate plaintiff for the pecuniary value of the things which he had lost by reason of his injury, but must have been influenced by passion or prejudice against defendant. We submit that the judgment should be reversed upon this ground, or that plaintiff should be required to remit a substantial portion of the damage awarded him.

For the reasons set forth the District Court was in error in declining to instruct the jury to bring in a verdict for defendant, and was again in error in refusing to grant a new trial, or to modify the judgment, by reason of the excessiveness of the verdict.

Dated, San Francisco,

October 1, 1921.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

No. 3705

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit.

ALASKA PACKERS ASSOCIATION (a Corporation),

Plaintiff in Error,

vs.

D. J. GOVER,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

FILED

OCT 14 1921

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CLERK.

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Attorney for Defendant in Error.

TABLE OF CASES AND AUTHORITIES CITED.

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399.

Pacific Telephone & Tel. Co. v. Starr, 206 Fed. 157.

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551.

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ALASKA PACKERS ASSOCIATION (a Corporation),

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Brief for Defendant in Error.

I.

STATEMENT OF FACTS.

In this brief I shall adopt the term "plaintiff" and "defendant" as used in the brief of appellant.

This case comes to this court upon a writ of error to the United States District Court of the District of Alaska, Division Number One, directed to a judgment entered in favor of the plaintiff in the sum of ten thousand dollars.

This action is one for personal injuries claimed to have been sustained by plaintiff under the following circumstances: The defendant, which is a cor-

poration engaged in the business of canning salmon and marketing its product, maintains a hatchery for the propagation of salmon located about 7 or 8 miles from Loring in Southern Alaska. The plaintiff in July, 1919, was employed by defendant to work at this hatchery, and he commenced work there on July 6th as a common laborer in and about the hatchery. His work was to cut wood and do general all-around work. On April 19, 1920, and in the forenoon of that day, plaintiff was engaged in building a fence at the hatchery, and in the afternoon he was directed by Patching, the hatchery superintendent, to get some boards down from an old flume, which boards were to be used in building the fence. The flume had been constructed for the purpose of conducting water to run a sawmill located at the hatchery. The mill had been operated since plaintiff started to work for defendant (pp. 46-47). The top of the flume was a little more than twenty-five feet from the ground and was reached by a vertical ladder. The ladder was constructed of native Alaska spruce, the uprights were 2x6, the rungs or steps were 1x4 and were twenty-four inches long (p. 95). Each rung was fastened to the uprights with three spikes at each end, and the top rung of the ladder was twenty-five feet from the ground. The rungs were also mortised into the uprights. This ladder had been constructed eight or nine years prior to April 19, 1920. It was a perpendicular ladder nailed to the building solidly, and therefore a stationary ladder, and used for the *sole and exclusive purpose* as a way or means of reaching

the top of the wheelhouse or flume, in order that the flume could be operated and regulated. So far as the evidence reveals throughout the case, the ladder was used solely as a means of ascent to the flume and descent therefrom to the ground. At the bottom of the ladder there was a walk, made of three pieces of 4x8 timber, which led to a tramway seven feet and two inches distant from the bottom of the ladder (p. 130). This tramway ran parallel to the flume.

The plaintiff testified (p. 22) that Mr. Patching told him to go up on the ladder and get a rope and a peavey to loosen the boards. Plaintiff did so and worked at this task until around four o'clock in the afternoon. He ascended the ladder, pried off the boards on top and then lowered them one by one to the ground (p. 43). He took some boards off the lower flume (p. 89) and did not have to climb the ladder to get them off (p. 90). In the case of each board he descended the ladder, removed the rope and reascended to lower another board, with the exception of those removed from the lower flume. The plaintiff testified that he had been up and down the ladder at least three times. Patching testified that he must have been up and down the ladder at least seven times (p. 113) from the number of boards that had been removed from the flume. The plaintiff testified that as he was making the last of these descents, and while he had his feet on or about the fourth rung from the top of the ladder, the top rung upon which his right hand rested pulled out, and that he fell backwards to the ground, striking the

edge of the tramway. It is for the injuries thus sustained that plaintiff sues. No bones were broken or sprains suffered, but the plaintiff testified that there were visible bruises on his back, and Dr. Mustard also testified that there was a bruise or contusion about the size of a dollar near the lower part of the spine. At the time plaintiff fell he had no load and the use of his arms and legs in descending the ladder was unimpeded.

Plaintiff testified that he was very nearly paralyzed by the fall and could not use an arm or his legs, and (p. 28):

“I hurt so bad that I don’t think a man could hurt any worse,—I don’t see how he could.

“Q. Did you suffer much pain?

“A. Indeed I did.”

Although plaintiff testified that he was suffering intense pain from the fall, the evidence shows he was able to call for help and that other persons working there were attracted by his call.

The evidence of plaintiff as to the condition of the ladder was given by plaintiff himself, in which he said (p. 42) that he noticed a little board, a rung from the ladder, was lying there after he fell to the ground; that the board was lying there and the nails were out and that on one side he could see rotten wood between the spikes—pieces of rotten wood there. He pointed out the defect to Mr. Orton after he had fallen (p. 90). He pointed up to it and showed Mr. Orton the cleat. The testimony shows that the plaintiff retained a clear recollection of practically

everything that was said and done after he regained his senses following the fall.

Patching, the superintendent, testified that the ladder was twenty-five feet high; that it had been built there eight or nine years prior to the accident; that it was constructed of native spruce; that native Alaska spruce should last for ten years without decaying (not that it would last that length of time); that the ladder in the same place and which the present ladder replaced had been torn down after five or six years because it was no longer fit for use (p. 117); and that present ladder was there at least three years longer. Patching also testified (p. 96) that he went up the ladder the same day from bottom to top and put his weight on each rung not observing any defect in the ladder; that he weighed 220 pounds. The foregoing constitutes all the evidence of any inspection made by the defendant and Patching stated (p. 120):

“Q. What did you go up there for?

“A. To see where was the best chance to get some planks to fix the fence.”

Patching also testified that the reason he did not bring into court the portion of the upright which was also claimed to have been defective and rotten was that he thought the rung would prove the condition of the ladder (pp. 118-119).

Plaintiff testified that after the injury he remained at the hatchery for about six weeks; that at first he had to drink through a straw; that in turning him over in bed they had to turn him with a blanket;

that he had no control over his bladder; that they had to use a syringe on him for his bowels; that he had been obliged to use crutches ever since; that at the time of the injury there were bruises on his hips and bruises a long time afterwards on his back; that afterwards and up to the trial he had no appetite, could not sleep and suffered intense pain from the region of his back down; that he was sent by the superintendent of defendant to their doctor, Dr. Ellis; that the doctor never examined him very carefully and treated him for rheumatism; that plaintiff did not discontinue treating with Dr. Ellis until he was notified by Heckman, the general superintendent, that Dr. Ellis said, "There was nothing wrong with you," and he guessed they could not do any more for him (p. 33), at the same time stating he would send Gover below if he would sign up; that thereafter Gover had another talk with Heckman, in which Heckman made the same statement; that thereupon Gover sought another doctor, Dr. Mustard, a practitioner of twenty years, as against six years of practice by Dr. Ellis. Dr. Mustard testified that at the time of the trial (p. 68) the contusion, bruise, which I spoke of was still marked by a round brownish pigmented area the size of perhaps a dollar; a tenderness between the eleventh and twelfth dorsal vertebrae was still quite marked; the large muscles of the buttocks on the right side, the gluteus muscles, were very, very much wasted, shrunk and destroyed, so that it was apparent to an ordinary eye; that the reflexes which, upon first examination

of patient early in the year, were very exaggerated, were now absent altogether; that this condition could have been caused by an interference with the nerve supply of the muscle and by an injury to the spinal cord (p. 68); that at the time of the trial, in the lumbar region of the back downward posteriorly, there was altered sensation; the skin is sensitive to touch but insensitive to pain; it is also insensitive to differences in temperature; Gover could not tell whether an object that you touched him with was hot or cold; he could be burned in most of the portions of that section and he would not know it; that he had made these tests a day or two before; that he was prepared to make them in court and before the jury (p. 69); that all of the conditions found in the patient, in the opinion of the doctor, were caused by a lesion of the spinal cord producing degenerative changes in it; that the prospects of improvement in the patient were practically null; that there is a center in the spinal cord in the sacral region of the spinal cord, where the spinal cord control of the bladder and bowels is located, and that an accident to that would cause serious conditions in the control of those organs (pp. 69-70); that the only symptom discovered in the patient of rheumatism was the pain that he suffered in the back, but that rheumatism or lumbago would not affect the degenerative condition of the nerves which the doctor had described. Dr. Mustard also testified, on cross-examination, that it would be unlikely a man would fall the distance that plaintiff fell and not break any

bones, but that it was entirely possible. The doctor's testimony as to the condition of plaintiff was based, not on hypothetical questions, as stated by defendant in his brief on page 8 thereof, but upon positive signs and conditions which he detected in the plaintiff and which he testified could not have been feigned. Such signs and symptoms have been described in this paragraph in discussing the doctor's testimony.

Testimony showed that the plaintiff was a man at the time of the injury sixty-eight years old; that he had been earning the sum of approximately \$5.00 a day while working for defendant; that he had lost about two days in the past nine months; that about one year before he started to work for the defendant, he had been prospecting in the hills in Alaska; that he was very strong and rugged and enjoying almost perfect health; that shortly before he went to work for defendant, he had walked twenty miles in one stretch, carrying a fifty-pound pack upon his back, and had made the trip at the rate of four miles per hour.

II.

THE DISTRICT COURT ERRED IN REFUSING TO GRANT THE REQUEST OF DEFENDANT FOR AN INSTRUCTED VERDICT (page 186), FOR THE REASON THAT THE LADDER WAS A SIMPLE TOOL, AND THE DANGERS GROWING OUT OF DEFECTS THEREIN, IF ANY, WERE ASSUMED BY THE EMPLOYEE.

In the brief for defendant, apparently the only

point relied upon for a complete reversal is as stated above. In answering defendant's brief I shall direct my brief only to the points raised in the brief of defendant, because it is practically admitted by defendant that the only error, if any there was, was committed with regard to the points raised in their brief.

Counsel for defendant, in support of the point that the ladder in this case falls within the simple tool doctrine, have cited nine cases. I shall take them up separately and point out wherein plaintiff contends they are not applicable in the case at bar. The cases cited by defendant tend to hold that in certain cases a ladder comes within the simple tool doctrine, but even in most of the cases the circumstances surrounding the ladder causing the injury are gone into by the courts and the courts indicate, at least inferentially, that the decisions may have been different had the circumstances surrounding the ladder been otherwise. Fortunately for plaintiff, the ladder upon which he claims to have been injured does not come within the classification of a simple tool or appliance. I shall deal with that point later on in this brief.

(1) *Cahill v. Hilton*, 13 N. E. 339. In this case the decision of the lower Court was reversed, the Court stating, however, in its opinion:

“We do not, however, care to rest the decision in this case upon this proposition, as we are, after careful consideration of the whole evidence, of the opinion that the ladder was not instru-

mental in producing the accident and even if it were, the mode and time of its use were not attributable to defendant."

This ladder was a simple device, about twelve feet high, and on page 343 of the same case the Court remarked:

"They not only did not furnish ladder for the use in which it was employed, but the accident was not attributable to the use of the ladder."

(2) *Nosal v. International Harvester Co.*, 187 Ill. App. 411. In this case we find no facts bearing on the nature of the ladder and the circumstances connected therewith. Surely, if the facts in this case were similar to the facts in the case of *Pacific Telephone and Telegraph Co. v. Starr*, decided by this Court, counsel for defendant would not seriously contend that the doctrine announced in the *Nosal* case would be the law in this jurisdiction.

(3) *Sivley v. Nixon Mining Drill Co.*, 164 S. W. 772. When it is observed from the extract of that case quoted by counsel for defendant in their brief that the Court used the term "that an ordinary ladder falls within the class of simple tools in respect to a defect in which the employer is held not liable," it indicates that it is not every ladder that falls within the doctrine contended for by defendant, and this case cites the case of *Rut v. True Tag Paint Co.*, 69 S. W. 324, which held the master liable because a ladder had been attempted to be repaired and that, owing to the manner in which it had been repaired, plaintiff was misled and injured. This shows that even in cases of an ordinary and simple

ladder the Courts have often made exceptions in following what counsel for defendant contend is the general rule, and the Sivley case also refers to the case of *Jones v. Pacific Mills Co.*, 57 N. E. 663, in which case the Court held that whether the defects in the ladder were obvious, open, etc., were questions for the jury. The Sivley case also cites the case of *MacDonald v. Lovell*, 82 N. E. 955, and held that in a case where the plaintiff was injured by the ladder slipping, this was a risk that was obvious and apparent to the plaintiff and was assumed by him, and stated in the case that the ladder was sound and suitable for the purpose for which it was used, indicating that perhaps its decision may have been otherwise had the ladder not been sound and suitable for the purpose indicated.

(4) *Christy v. Southwestern Missouri Ry. Co.*, 110 S. W. 694. In this case the plaintiff was held to have assumed the risk because he knew of the condition of the ladder, which was old, scarred and weak, holding that *that* the plaintiff used the ladder knowing its condition.

(5) *McKay v. Hand*, 47 N. E. 104. This case also shows that the Court took into consideration the fact that there was no evidence to show that the ladder was rotten or cross-grained, not indicating, of course, what its decision would have been had there been evidence of that nature.

(6) *McGill v. Cleveland etc. Co.*, 86 N. E. 989. This case held that where the plaintiff knew of the defects in an *ordinary* step-ladder, about seven feet high, and continued to use it, he assumed the risk,

even though the master had promised to furnish a new ladder. There is a broad distinction between an *ordinary step-ladder* and the one in case at bar, especially where the plaintiff did not know of the defect.

(7) *Blundell v. Wm. A. Miller Elevator Mfg. Co.*, 88 S. W. 103. In this case plaintiff was injured while using a ladder about twelve feet high. The ladder slipped. The Court held this a simple appliance and that plaintiff assumed the risk, but, like a good many other cases referred to above, the Court states there was no evidence tending to show that the ladder was not sound and also held in deciding the case that there was no evidence to show that the ladder was furnished by the defendant.

(8) *McNamara v. Macdonough*, 102 Cal. 575. In this case plaintiff was injured while working on a scaffold and the verdict was sustained on appeal. In this case the instruction given by the lower Court was approved by the Supreme Court and simply amounts to this—that a person who works upon a scaffold with knowledge or means of knowledge of any defects therein assumes the risk. This would be true in any case, but the means of knowledge of the defect and the means of obtaining such knowledge would be different, depending upon the experience, etc., of the person employed.

Thus, by referring to the above cases, it is observed that in every case the ladder was in fact a most simple appliance, notwithstanding which the Courts have intimated, inferentially at least, that the decisions in some may have been different had there

been testimony to show that the ladder was not sound or suitable. Even counsel for defendant concede that not every ladder falls within the rule they contend applies in this case, and this is shown by their anticipation of the citation by plaintiff of the case of *Pacific Telephone & Telegraph Co. v. Starr*, 206 Fed. 157 (decision by this Court). Counsel have shown extreme shrewdness in citing this case in their brief, because it is possible it may not come with the same amount of force as if it had been referred to for the first time in the brief of plaintiff. It is also easily apparent that counsel greatly fear the force of this case.

Plaintiff contends that the Starr case, taken in its strongest aspect, is no stronger than the case at bar. In that case an extension ladder was used and the plaintiff was about twenty or twenty-five feet from the ground when the injury occurred. Also in that case the ladder was a portable ladder, one which could have been viewed from all sides and angles. In the case at bar the ladder causing the injury was twenty-five feet high, was vertical and was nailed solidly to the wheelhouse or flume. It was, in fact, a part of the structure, for it could not have been used for anything other than the purpose for which plaintiff used it when injured. It could not have been removed to other places of the defendant's property and used for any other purpose. It surely was not a ladder of the *ordinary* kind, such as a *step-ladder* and *short contrivances used about the house*. It was an extremely dangerous instrumentality on account of its height from the ground. It is true that it

was not an extension ladder, as in the Starr case, *supra*, but it was equally as dangerous and complex a ladder as that in the Starr case. Counsel have endeavored to show that this court based its decision in the Starr case upon the nature of the work in which the plaintiff was engaged and that therefore the case at bar does not come within the doctrine announced; but it is observed that the plaintiff in the Starr case fell a distance of between twenty and twenty-five feet. How do counsel escape the fact that the nature of the work required in the case at bar caused the plaintiff to ascend a distance of over twenty-five feet and that the nature of the work, to wit, taking down the boards, required plaintiff to ascend to an even greater height than in the Starr case at the time of the injury? There is absolutely no distinction in the Starr case and the case at bar, unless it is that the case at bar is a stronger one on account of the circumstances surrounding the ladder, and the conclusion is almost irresistible that the ladder in the case at bar is not only not a simple tool or appliance, as contended for by counsel for defendant, but is an instrumentality just as complex and dangerous and unusual as the ladder in the Starr case. It should be noted in this connection also that the danger of an injury from the ladder in the case at bar is even greater than in the Starr case, because one falling as plaintiff did could not possibly have the same opportunity to catch himself, because of the fact that the ladder is straight up and down and the law of gravity would throw him out and away from the ladder, while in the Starr case the ladder was placed

against a building and a person falling would have much more opportunity to save himself from injury because in falling he would not leave the ladder so suddenly as if it were perpendicular.

However, regardless of what view this Court takes of the above proposition, still the cases cited by defendant and referred to herein cannot possibly have any application to the case at bar. The reason is this—the ladder in this case was a ladder in name only. Its true purpose was to afford a means of getting up to the top of the flume in order to regulate the flow of water therein and then to descend to the ground. It was no less a means of egress and ingress than if the flume in question had been located on level ground and the ladder had also been placed on the ground and used as a walk to reach the flume. It was simply the means by which a person could get from one point (on the ground) to another (top of the wheelhouse or flume). As stated, had the ladder been used as a walk and located on the ground in order to reach the flume, would counsel contend or would this Court hold that it was a ladder and a simple appliance? If not, then it is still a greater reason to hold that it is not in fact a ladder and therefore a simple appliance, where it has been used, as in this case, as a medium to reach the flume from the ground,—for, regardless of anything that appears in the record, that was the sole and exclusive purpose of the ladder. It thus appears that the term “ladder” has been a misnomer because, as shown above, its purpose was never that of an ordinary ladder and although the Court at the trial of

this case referred to the subject as a ladder, still in its instructions (p. 97) the Court had in mind the true purpose of the ladder in this case and instructed the jury as follows:

“It is the duty of the master to use ordinary care, the care of an ordinarily prudent person, to see that the appliances furnished the employee wherewith to do the work required of him are reasonably safe and adapted to the work, and *it is the duty of the master to use reasonable care—ordinary care—to see that the place where the work is to be done is reasonably safe and that the way of getting to the work or of leaving the work is reasonably safe.*”

Of course, inasmuch as the ladder in this case could not be termed a walk, for the reason it was not located on the ground, there could be but one other definition and that is, that in fact and in purpose it was used in lieu of a stair.

O'Brien v. Northwestern Consolidated Milling Co., 137 N. W. 399. In this case plaintiff was injured by the breaking of the top round in a short ladder that was used in lieu of the stair to go from one floor to another. In the *O'Brien* case it was urged that the ladder causing the injury was a simple tool. The Court held (p. 401):

“We hold that the rule suggested does not apply to the instant case and that the authorities relied upon by the defendant are not in point. Considering the long-continued absolute and exclusive use of this ladder as a means of ingress to the packing-room, it must be taken

for all practical and legal purposes as the equivalent of a stair. Plainly the defendant cannot justly complain if the ladder which it installed in lieu of a stair be held to be a stair, in contemplation of the law, with the same resultant duty on the part of the defendant to maintain and keep it safe, as though it were in fact a stair.

“The instruction challenged was, therefore, correct, and it was a question for the jury under the circumstances described whether the defendant used ordinary care in furnishing the plaintiff with a reasonably safe place to work, the ladder, when considered as a stair, being properly termed to be the nature of such place.”

Pacific Telephone & Telegraph Co. v. Starr, 206 Fed. 157. This case is practically decisive of the case at bar.

Pendergrass v. St. Louis & S. F. R. Co., 162 S. W. 712. This case is a very strong one in support of plaintiff's case. The plaintiff therein was injured by the breaking of a rung in a ladder which was used as a means of ingress and egress from the ground floor to the pit, wherein was installed the pump and boiler. The ladder was about ten or twelve feet high. In this case plaintiff's duties were ordinarily performed above the ground and not in the pit, but it was necessary for him at times, sometimes several times a day, to descend into the pit and look after matters pertaining to the machinery located therein. It was contended in this case (p. 715) that:

“plaintiff used the ladder quite a number of times during the period in question; that it was a simple appliance and that he knew its condition even better than the master, and must be held to have assumed the risk therefrom. This contention is without merit, however, for the reason that the ladder was *a part of the premises upon and about which plaintiff was required to work. It was the only method provided for ingress and egress to and from the pit into which it was necessary for him to go from time to time.* He had been employed at the place about six days and it cannot be said that he knew the condition of the premises or that he assumed the risks of any dangers that might lurk therein which were not so obvious as to deter a man of ordinary prudence from using the same. It was the master’s duty to exercise ordinary care to furnish him a reasonably safe place to work, which included a reasonably safe means of descending to the machinery in the pit.

“*And the ladder was not a common tool or in fact in this case a tool at all in the proper sense of that term but a fixed part of the premises upon and about which the plaintiff was required to work,* and whatever may be said as to the rule regarding the duty of the master to inspect appliances in the nature of common tools of everyday use, the rule would clearly have no application here.

“It is said that the defect in the ladder, if any, was a latent one which could not have been dis-

covered by the exercise of ordinary care on the part of the master and that therefore there can be no recovery, but we think that there was sufficient evidence to take to the jury the question of whether the master had properly discharged its duty toward the servant to exercise reasonable care to provide the latter with a reasonably safe place to work. It appears that this ladder had been in use for a number of years. Defendant's foreman of the bridge and building department testified that it was there when he took charge of this department, nearly four years before the accident. The pump repairer thought that it had been there as long as he had had anything to do with this station, which was four or five years. No witness could say when it had been installed. There was no evidence of any repairs ever having been made upon it, nor was there any evidence that it had ever been inspected in a way which would have revealed any defects or insufficiencies therein. It is true that defendant's foreman of the bridge and building department testified that he knew that a month before the accident he was in the pit and examined the ladder and the premises generally, as was his custom, but it quite clearly appears that this examination was a very superficial one. There was testimony to the effect that the ladder was so covered with dirt and grease that one looking at it by the light of a torch, as did this witness, could see but little if anything more than the fact that it had remained intact. This

witness merely said that when he was in the pit he 'looked at the ladder' and said: 'I am always looking for defects; I examined the ladder when I was there and went up and down it; I had a torch.' This was the only evidence relating to any inspection of this ladder at any time prior to the accident. The duty resting upon the master in such cases to inspect and make such examinations and tests at reasonable intervals as may be reasonably necessary to ascertain the condition of the place or instrumentality in question is an affirmative and continuing duty. 'It will not do to say that, having furnished suitable and proper machinery for the plant, the master can thereafter remain passive so long as they work well and seem safe. The duty of inspection is affirmative and must be fulfilled and positively performed. Anything short of this would not be ordinary care.'

"And relative to the performance of the master's duty to inspect, our Supreme Court, *Gutridge vs. Ry.*, 105 Mo. 520, said: 'We quote these authorities to show that the master is not always, and under all circumstances, excused if he could not see a defect. And if the conditions are such as would excite suspicion in a man of ordinary prudence he must go further and apply other tests. . . . What the ordinary tests as applied to railroad appliances are are not disclosed by this record; but we feel satisfied that looking is not the only test. The master must

use such reasonable tests to discover defects as ordinary prudence suggests.'

"And in *Labatt on Master and Servant* it is said: 'In view of the natural tendencies of an inorganic instrumentality to become less and less safe the longer it is used, the court will not set aside a verdict for the servant which is based upon the theory that the failure to inspect it was culpable where the evidence shows that it had been a part of the master's plant for such a period that, taking into account the nature of the materials of which it was composed, the functions which it was performing, and the various influences to which it was exposed by climatic changes or physical forces, it is not an unreasonable inference that a prudent man would have examined it for the purpose of ascertaining what its actual condition was.' "

This case, it seems, is exactly in point with the case at bar. The ladder was used in going from the ground up instead of going from the ground down and there can be no material difference on account of that fact. The outstanding point is that *the ladder was used as a means of ingress and egress to and from the ground floor to the pit where the work was to have been performed. In the case at bar the ladder causing plaintiff's injury was used solely and exclusively for the same purpose, to wit, affording a means of getting to the flume and then descending to the ground.* Also in the Pendergass case, *supra*, the ladder was not exposed to the elements, it was inside the building. What makes the case at bar

stronger is—the ladder was exposed to all the elements, rain, snow, heat, frost, etc. The ladder in the Pendergass case was about four or five years old—in the case at bar the undisputed testimony shows it was eight or nine years old and according to Patching's testimony should last ten years (not that it would). In the Pendergass case an actual inspection had been made by using a torch. In the case at bar no inspection had been made other than that Patching testified he went up the ladder to see where he could get some plank to fix the fence. He nowhere testified that he made an inspection. Furthermore, actionable and culpable negligence is shown by Patching when he states he did not know when he had ever been up the ladder before and could not even give any estimate of the time. It must be quite convincing to this Court that the only reason Patching went up the ladder on the day of the accident was to find out where he could get plank to fix the fence,—and not to make any inspection whatever, as claimed by defendant. But even assuming that which Patching did constituted any inspection, it surely was a question for the jury to decide under the circumstances whether Patching actually did go up the ladder as he claimed and whether or not his act described by him was a sufficient and proper inspection.

Twombly v. Consolidated Electric Light Co., 64 L. R. A. 551. Plaintiff was injured by falling about twenty-five feet from a ladder, a rung of which broke while plaintiff was working thereon. It was urged, as in the case at bar, that the ladder was a simple tool. The Court said (p. 553):

“But it is contended as a matter of law that the defendant is not liable under the evidence. It is urged that there is no duty resting on the master to inspect, during their use, those common tools and appliances with which everyone is conversant; that if they wear out and become defective the employer may rely upon the presumption that those using them will first detect the defect; and that the employer is not to be held for negligence when the tool is a common one, of the fitness of which the servant is as competent to judge as the master. . . . But it seems to us that a forty-foot extension ladder is not a common tool or appliance within the meaning of those rules. A defect in the ladder arising from age or decay which might not be discoverable by such inspection as a workman is expected to make, might be upon more careful inspection. . . . but that is not this case. The plaintiff was under no special duty to inspect or repair this ladder except as a rainy-day work in common with his fellow-laborers when he might be directed specially to do so.”

Mo. K & T. Ry. of Texas v. Steele, 110 S. W. 171.

In this case the Court held:

“Where defendant provided a ladder by which its servant was expected to reach one of the manhead doors in the rear of the boilers of defendant’s plant, such ladder constitutes a ‘place’ within the rule requiring a master to furnish his servant with a reasonably safe place.”

It is so apparent in the case at bar that the ladder in question was not a simple tool or appliance as contended for by counsel for defendant that it is useless in our judgment to cite further authorities on that point.

Counsel next contend that plaintiff must be held to have assumed the risk because he qualified as an expert on the duration and usefulness of spruce wood and that he could have observed the rotten condition and defect in the ladder, if any there was. The evidence does not show that plaintiff testified as an expert in this regard. He simply stated (p. 86) that he had had *some* experience with timber during his life and that native timber standing exposed to the elements for twenty or fifteen years would be likely to decay, but just preceding this plaintiff had positively testified that he could not tell the age of timber and that he did not know the age of this particular ladder at the time he ascended it and that the superintendent had not told him the age. He also stated that "he did not observe any defect in the ladder at that time, that he thought it was just like the other things around there, that it was all right because he took it that the superintendent would not have sent him up there unless it was, and that he went up the ladder just the same as he came up the stairs here, or anything like that," and when asked why he did not stop work and make a careful inspection of the ladder, he said, "I wasn't told to do that, I just followed Mr. Patching's instructions." Furthermore (p. 25), plaintiff testified that Mr. Patching did not instruct him to take

down the ladder or any portion of the wheelhouse, but that he carefully instructed him (pp. 25-26): "Be careful; don't hurt the flume because we want to use that still," and in this connection the evidence shows that defendant could have detected the condition of the ladder had they made a special inspection and also by tapping the ladder with a mallet.

Along this same line, counsel for defendant said in their brief (p. 17):

"Plaintiff claims that his right hand only was on the rung which pulled off. Where was the left hand? His feet were firmly placed upon the fourth rung and did not slip. The slightest attention to his movements must have protected plaintiff, as a child of tender years would have been perfectly able to grasp the rung or the side of the upright instead of this alleged defective rung."

It is apparent that counsel have very little knowledge of a ladder or they would not make this statement. It is common knowledge that in ascending or descending a ladder a person holds onto one rung with one hand and then goes up or down, whichever the case may be, moving his hands and feet accordingly. If he did not take either hand off he would never move. In this case, plaintiff's left hand was moving down to get another hold. This left but one hand on the rung which broke and which naturally had thereon a greater strain. After removing his left hand, the added strain caused the top rung to pull out. The law of gravity would naturally throw the plaintiff away from the ladder; therefore how

could he have protected himself from a fall? Had it been a slanting ladder, as was used in practically all the cases cited by counsel for defendant, plaintiff would have had an opportunity to grasp the ladder in falling, but not with a vertical ladder such as this, and furthermore, plaintiff could not have taken ahold of the upright for the very good reason given by Mr. Patching, their witness, in endeavoring to show that he placed his hand on every rung of the ladder, when he said on cross-examination that he could not take ahold of the upright unless he pinched it with his fingers, because it was nailed solidly to the building. Thus it is seen that the very argument endeavored to be used by counsel for defendant is a strong point in favor of plaintiff. It shows clearly that the ladder in the case at bar was not a simple appliance.

Counsel further contend that if the defect were latent, under the ruling in the Starr case there could have been no liability. What is there to show the defect was latent? The testimony of plaintiff is that the rung was rotten, that the upright was decayed and defective, that this could have been discovered by making what he termed a special inspection, or by tapping the ladder with a mallet, and in this connection it is well to note that the evidence shows that the defective portion of the ladder was in the upright and the rung at the very end. It is not reasonable to think that a man going about his work using the ladder would look on the side of the ladder, perhaps, to ascertain if it were safe, but it is reasonable to assume that an inspection would

have revealed this rotten and decayed condition at the end of the rung and on the side of the upright. Under this evidence, and even in the absence of this evidence, with regard to the inspection, the evidence of plaintiff to the effect that the upright and rung on the ladder were decayed and rotten would have been sufficient to make a case for the jury. Plaintiff's evidence, taken together with all the facts, that the ladder was eight or nine years old; that the ladder in the same place before this one was removed was also taken down when it was five or six years old, because, as Patching testified, it was no longer fit for use; that the ladder was exposed to the elements and that Patching went up the ladder the same day of the accident—to find out where he could get some plank to fix the fence with (not to make an inspection)—and that he must have put his hand on each rung, because otherwise he could not have gone up, make out an exceedingly strong case, which was properly submitted to the jury, as to whether or not defendant used reasonable care in providing plaintiff a safe place to work and more particularly a reasonably safe means of getting to the work and returning therefrom, just as the Court instructed as shown on page 197, and as to whether any inspection was required and if so, whether the one claimed to have been made by defendant was proper under the circumstances, etc.

The principle discussed above is almost fundamental and requires no citation of authority. The general rule is, as stated in Labatt's *Master and Servant*, Vol. III, p. 2815:

“Whether or not the duty of the master with regard to proper inspection has been performed by the application of any given test is to be determined by considering whether that test will give indication as to the actual condition of the instrumentality in question. In the application of this principle the courts have usually proceeded upon the theory that a merely visual or ocular inspection of external conditions does not satisfy the full measure of the master’s obligations, where the servant’s safety depends upon the soundness of the material of which an instrumentality is composed, or upon the firmness with which the separate parts of an instrumentality are attached to each other.”

The question of whether the examination to which the instrumentality which caused the injury was actually subjected before the accident was such as to satisfy the standard is primarily one for the jury.

III.

THE JUDGMENT IN THIS CASE SHOULD BE REVERSED UPON THE GROUND THAT THE VERDICT OF THE JURY WAS EXCESSIVE.

Under this heading, counsel do not cite any authorities to show that the verdict is excessive. If the testimony given by plaintiff and the doctor, who testified in his behalf, is true, and it must be taken as true, then the amount of the verdict is not excessive, when it is taken into consideration the permanency of the injuries and the pain and suffering undergone by plaintiff. The jury saw the condition

of plaintiff at the trial and under proper instructions of the court assessed the damages. There is not a scintilla of evidence to show that the jury was influenced by passion or prejudice against the company. This Court can easily perceive that the record in this case is very clear and deals strictly with the facts. There was no attempt shown to create any prejudice against defendant and in this connection it is perhaps pertinent to note the actions adopted by counsel for defendant at the trial. When counsel for defendant cross-examined plaintiff, he asked him if he had not told witnesses Patching and Peterson, who were witnesses for defendant, that he, plaintiff, had been smashed up in an accident before this injury, and then by reading Patching's and Peterson's testimony when they took the stand, the record showed that counsel never asked them if plaintiff made such statements. It is noted that plaintiff flatly denied that he had ever been injured before, or made such statements. If the jury took those facts into consideration, then surely defendant cannot now complain.

In the case of Pendergass, *supra* (p. 719), it was urged that the verdict therein was excessive. The Court held:

“In view of the testimony to which we have alluded before, it is altogether clear that we would not be justified in declaring the verdict excessive. There is ample evidence to support a recovery to the amount of the verdict and whether plaintiff was exaggerating the extent of his injuries and was less injured than he pro-

fesses to be, as appellant seems to think, was a question to be considered and determined by the jury.

The verdict of the jury is not excessive. 13 Cyc. 129:

“In case of injuries to the nervous system a verdict will rarely be considered excessive. So in injuries to the spine that have resulted from a personal injury, the Court is little inclined to interfere with a verdict on the ground that it is excessive.”

13 Cyc. 131:

“The Courts have gone so far as to refuse interference on the ground of excessive damages, not only where there is a probability of permanent injury, but where the evidence shows a possibility exists.”

For the reasons stated herein, there was no error, and the verdict should be affirmed.

Dated at San Francisco, Cal., Oct. 12, 1921.

Respectfully submitted,

A. H. ZIEGLER,

Attorney for Defendant in Error.

No. 3705

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA PACKERS ASSOCIATION

(a corporation),

Plaintiff in Error,

VS.

D. J. GOVER,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

H. L. FAULKNER,

CHICKERING & GREGORY,

Attorneys for Plaintiff in Error.

FILED

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No. 3705

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALASKA PACKERS ASSOCIATION

(a corporation),

Plaintiff in Error,

VS.

D. J. GOVER,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

I.

THE FACTS OF THE CASE.

The statement of the facts of this case contained in the brief for defendant in error follows so closely the statement contained in our opening brief that we have very little occasion to criticise the same. There are, however, several matters stated as facts which give an erroneous impression, and we shall proceed to point these out.

The first misleading statement is found at page 5 of the brief for defendant in error. It is there stated that the original ladder, which was constructed of

native spruce and which was torn down after it had been in place five or six years, was removed because it was no longer fit for use. It is true that Patching, the superintendent of defendant's hatchery, did testify on cross-examination at page 117, that this was the reason for the removal of the original ladder. This testimony of his must, however, be taken in conjunction with his further testimony also upon cross-examination, where he testified as follows:

“Q. Why was that ladder taken down?

A. To make room for the sawed lumber ladder. When we first started there we made all of our ladders out of poles,—when we first started there we had no sawmill, and when we got the sawmill—it is only a small sawmill—we were using a large amount of lumber and lumber was very scarce, and we made all of our ladders out of poles; so after awhile, when he got more lumber, we made the ladders out of sawed lumber.

Q. And is that the reason the pole ladder was replaced by the other ladder? A. Yes, sir.”

The second misleading statement is found at page 6 of counsel's brief, where it is stated that Dr. Ellis, who was the medical witness called by defendant, was “their doctor”, meaning the company doctor of defendant. As appears upon page 130 of the transcript, upon the direct examination of Dr. Ellis, he was neither under contract with the defendant nor was he in their employ in any way either at the time of the trial or at the time Gover first came to see him.

On page 24 of the brief, counsel asserts that plaintiff testified positively that he could not tell the age

of the timber. No reference to the transcript is given in support of this statement, and we can find nothing in the record to substantiate it. Plaintiff twice, on pages 86 and 87 of the transcript, asserted that he had had experience with timber, and that he was in a position to tell whether or not, when exposed to the elements for twenty years, it would decay. He also testified that it was not a long-lived timber.

II.

THE COURT ERRED IN REFUSING THE REQUEST OF DEFENDANT FOR AN INSTRUCTED VERDICT.

Counsel has sought to meet our contention under this heading first by attempting to differentiate the numerous authorities cited by us in support of our theory that the ladder in question was a simple tool; next by trying to bring this case within the rule of *Pacific Telephone & Telegraph Co. v. Starr*, 206 Fed. 157; and, finally, by citing four cases which it is contended show that the ladder from which Gover fell was no ladder at all.

1. **The attempted differentiation of the cases cited by us has not been successful:**

Most of the grounds of differentiation relied upon by counsel are trivial. They have no bearing upon the real holding of the cases which we have cited. We will take these cases up in the order in which counsel has referred to them, and show that the

attempted differentiation has, in no case, been successful.

It is true that in *Cahill v. Hilton*, 13 N. E. 339, the language of the court with reference to a ladder being a simple tool may be a dictum, inasmuch as, after writing the opinion in question, the court reached the conclusion that the accident might not have been caused by the ladder at all. The reasoning, however, of this dictum is unexceptionable, and the case is strongly persuasive. The fact that the ladder in the case was but twelve feet high is not an important distinction so long as it is borne in mind that it was a simple ladder, as was the one in the case at bar, instead of being a complex extension affair, such as the one in use in the *Starr* case.

The attack made upon *Nosal v. National Harvester Company*, 187 Illinois Appellate 411, is wholly unjustified. It is contended that in the report of that case the facts are very meagerly stated. No details are set forth concerning the exact nature of the ladder. It must therefore be presumed that it was a simple ladder having no special features. We certainly do not question the statement of counsel when he says that if the facts were disclosed and were shown to be similar to those disclosed in the *Starr* case, that we would then not seriously contend that the doctrine announced by the case would be the law in this jurisdiction. Inasmuch, however, as the facts as reported do not show even an approach to the conditions existing in the *Starr* case,

we believe that *Nosal v. National Harvester Company*, supra, strongly supports our position.

Counsel complains that the extract contained in our brief from the case of *Sivley v. Nixon Mining Drill Co.*, 164 S. W. 772, shows that in order to come within the simple tool doctrine a ladder must be an ordinary one, and that, therefore, not every ladder falls within the doctrine. We admit this to be true. The *Starr* case establishes such a limitation upon the rule without question. We also admit that the case of *Ritt v. True Tag Paint Co.*, 69 S. W. 324, cited and distinguished in the *Sivley* case, shows that there is a further limitation upon the doctrine to the effect that if repairs have been made and the employee has thereby been misled into the erroneous belief that the ladder is again sound, the employer may be held liable.

The distinction attempted to be made with regard to *Christy v. Southwestern Missouri Railway*, 110 S. W. 694, is that in that case the plaintiff was held to have assumed the risk because he knew that the condition of the ladder was old and weak, having used it with that knowledge. It is our contention that plaintiff in the case at bar, although he had not used the ladder long, had ample opportunity as an expert in woods to observe any defects which were so patent as to be easily observable.

We do not understand the attempted differentiation of *McKay v. Hand*, 47 N. E. 104. It is said that in that case the court took into consideration

the fact that there was no evidence to show that the ladder was rotten, and that the court did not indicate what its decision would have been had there been evidence of that nature. There is, however, in the case not the slightest intimation that if there had been evidence of rottenness in the ladder the decision would have been otherwise.

Counsel says that *McGill v. Cleveland*, 86 N. E. 989, is to be distinguished upon the ground that in that case there was an ordinary step ladder, italicizing the word "ordinary". Again we assert that there was nothing extraordinary in the ladder from which plaintiff fell in this case.

It is claimed that in *Blundell v. Wm. A. Miller Elevator Manufacturing Co.*, 88 S. W. 103, there was no evidence tending to show that the ladder was not sound. Neither is there any intimation by the court that had there been evidence of unsoundness the Supreme Court would have affirmed the judgment, the court having reached the conclusion that the ladder in question was a simple appliance, its defects and the dangers flowing therefrom were wholly assumed by the employee, and it made no difference whether defects actually existed or not.

2. The bearing of the Starr case upon the case at bar:

We cannot honestly take credit for the extreme shrewdness assigned to us by counsel by reason of the fact that we cited in our opening brief the case of *Pacific Telephone and Telegraph Co. v. Starr*, *supra*. Neither are we willing to admit that we

greatly fear the force of this case. It was the most natural thing for us to do, the case being a decision of this Circuit and being the only Federal case of which we are aware in which the question of a ladder as a simple tool has been raised. It would have been mere evasion to have ignored it. We were willing to use it in our brief for the reason that we feel that this case seems to support plaintiff only because it holds that a certain ladder was not a simple tool, and that, when analyzed, it really supports our contention that most ladders, including the ladder in the case at bar, are appliances which come within the simple tool doctrine.

Apparently counsel's position is that the only kind of ladder which comes within the simple tool doctrine is a short portable ladder, either of the leaning or the step ladder variety, and that any other ladder is an extraordinary one coming within the rule of the *Starr* case. Upon reasoning such as this, it is concluded that the ladder from which Gover fell is not a simple appliance because it was not portable. We submit that a vertical stationary ladder with the rungs mortised firmly into immovable uprights is the simplest and safest form of ladder imaginable. It is not subject to collapse, as is a portable step ladder, and is not subject to the same side strain as is a portable straight ladder which may not have all four of its usual points of support properly lined up. It is therefore not equally as dangerous and complex as the ladder in the *Starr* case, as counsel contends, but is as safe

and simple an appliance as could be devised. The *Starr* case is further to be distinguished upon the ground that in it the ladder constituted virtually a place of employment—the place where the employee was active a major part of the time. In this case the ladder in question was simply an incident to the place of employment, a means of getting from the ground to the place where, for the time being, the man was actually working. Counsel also contends that the ladder in this case was a more dangerous agency than the ladder in the *Starr* case, for the reason that here the ladder was perpendicular, whereas in that case there was sufficient slant to make it possible for one who had lost his hold upon one rung to grasp another. This is a distinction that goes rather to the manner of the use put to the ladder than to any inherent defect or danger in the structure itself.

3. The appliance from which Gover fell was actually a ladder:

After using the word “ladder” three times in describing in the amended complaint the appliance upon which Gover was injured; after using this word without qualification throughout the entire trial of the case in order to describe this same appliance; and after using the word repeatedly throughout the first half of his brief, counsel, at page 15 of said brief, suddenly concludes that the ladder in question is not a ladder at all. The contention made in this regard is that the ladder was simply a means of ingress and egress from the

flume or place of work of plaintiff. Without question it was the means of reaching the place of work and the means of descent therefrom, but how this rendered it any less a ladder it is difficult to conceive. We are asked if the ladder had been used as a walk located on the ground in order to reach the flume, should we then contend that this was a ladder. Certainly we should not.

Plaintiff's contention that the ladder here in question is not a ladder at all, seems to be based upon two distinct theories. The first of these is that it could not be a ladder because it was simply a means of ingress and egress to and from the place of work. The second is that it could not be truly a ladder because it formed a part of the place of work itself.

In support of the first of these theories, the case of *O'Brien v. Northwestern Consolidated Milling Co.* (Minn.), 137 N. W. 399, is cited. In that case the ladder in question was one four or five feet in length, which was used as a means of getting from one large room in the defendant's flour mill to another, these rooms being on a slightly different level. This ladder had been used in lieu of a stair for a great many years, and was, so to speak, a main thoroughfare leading from the upper to the lower level. Under these circumstances, we believe that the court was justified in reaching the conclusion that the appliance in question was rather in the nature of a stair than a ladder, and for that

reason any defect therein was to be governed by the safe place of work doctrine rather than the simple tool and appliance doctrine. The ladder in the case at bar, being neither in the nature of a stair nor being used as a thoroughfare, does not come within the rule of the *O'Brien* case.

The case of *M. K. & T. Ry. Co. v. Steele* (Texas), 110 S. W. 171, also cited by plaintiff, refers to the ladder there under consideration as being a portion of a place of work, but in it it is apparent that no argument had been made to the effect that the ladder was a simple tool,—such a possibility having been ignored wholly in the opinion,—and it is hardly a convincing authority in favor of plaintiff's contention.

Twombly v. Consolidated Electric Light Co., 98 Me. 353, is easily distinguishable. It clearly comes within the exception laid down by the *Starr* case with regard to extraordinary, as distinguished from ordinary, ladders. We agree with the statement of the court in that case, wherein it is said:

“It seems to us that a forty foot extension ladder is not a common tool or appliance within the meaning of those rules.”

A further similarity to the *Starr* case is to be found in the fact that the defendant was an electric light company, using such extension ladder as a part of its regular business, and work upon such ladders was labor in the regular place of work, instead of merely being an incidental thereto.

The case of *Pendegrass v. St. Louis etc. Ry. Co.* (Mo.), 162 S. W. 712, is much relied upon by counsel. In it the plaintiff was employed at a pumping station operated by the defendant. One of his duties was to descend into a pit containing the pump, several times a day. This pit was from ten to twelve feet deep, and the bottom thereof was reached by means of slats nailed to the uprights forming the sides of the pit. Plaintiff was injured by one of these slats tearing loose and precipitating him to the bottom of the pit. The court reached the conclusion that this series of slats was not a ladder at all, and that there was no question of a common tool or appliance. This conclusion came because the slats appeared to be an integral part of the place of work as being the only means of ingress and egress from such place. The case differs from the case at bar by reason of the fact that the pit was a regular and invariable place of work for the injured employee; whereas Gover, while working upon the flume, was doing something wholly out of the ordinary and at which he probably would not have worked more than one or two days. The flume, therefore, and the incidental means of reaching it, could not be strictly called a place of regular work, but simply a place of temporary activity. The case further differs from the case at bar because of the anomalous nature of the series of slats, which could hardly be considered as a ladder at all. Both the testimony in the case here under consideration and a glance at Defendant's

Exhibits Nos. 1 and 2, found at pages 187 and 188 of the Transcript, remove all possible doubt as to whether or not the appliance here was strictly a ladder.

4. The inspection made prior to the accident was the best possible test.

As we pointed out in our opening brief, the requirements of the law with regard to a satisfactory inspection of the ladder were more than met by Mr. Patching, the superintendent of defendant's hatchery upon the day of the accident and shortly prior thereto. We pointed out that this constituted more than a mere visual inspection, because it consisted of an actual test of each rung of the ladder.

In spite of the uncontradicted testimony in support of such a view, counsel contends that the inspection was unsatisfactory. At page 25 of his brief, he intimates that defendant could have detected any unsound condition in the ladder if it had tapped the ladder with a mallet. We submit that no amount of tapping could be half so effective in the disclosure of weaknesses as was the placing upon each rung of the full weight of a man weighing 220 pounds. Such a test, surely, meets the requirements of inspection laid down in the quotation from *Labatt's "Master and Servant"*, Volume III, page 2815, quoted in plaintiff's brief at page 28, to the effect that

“A mere visual or ocular inspection of external conditions does not satisfy the full measure of the master's obligations.”

III.

THE DISTRICT COURT SHOULD HAVE GRANTED THE REQUEST OF DEFENDANT FOR AN INSTRUCTED VERDICT, FOR THE REASON THAT PLAINTIFF'S EVIDENCE IS INCREDIBLE AND IMPOSSIBLE OF BELIEF.

We fully realize that this court will not interfere with the judgment of the jury where the evidence is conflicting; also that questions of fact are primarily for the jury. We must here invoke the rule that the evidence must be so contrary to the common experience of mankind as to make it impossible of belief; for instance, we assert that if a plaintiff should testify that he fell from the top of the Woolworth Building, in New York City, to the pavement below, but that he suffered no bruises or objective injuries, and if a jury, upon this evidence, should decide in his favor, that an appellate court would correctly rule that such evidence was impossible of belief. We assert that the facts of the instant case are equally clear. Both the testimony of the plaintiff and the argument of his counsel make clear his claim that he did not *slide down* the ladder, or that anything impeded his fall, but to the contrary, that "he fell backwards to the ground, striking the edge of the tramway (brief for defendant in error, pp. 3-4). The plaintiff testified (p. 43):

"A. * * * I fell clear outside.

Q. You fell clear outside?

A. Yes, clear outside of that."

and (p. 41):

“A. * * * I couldn’t go straight down, my feet didn’t slip off, understand, but I had that foot on the rung, and when I fell I fell back, and I tried to get my head down between my shoulders that way.

Q. Your feet did not slip at all?

A. This foot didn’t slip until after I got out a ways.”

and at page 23:

“A. * * * My right foot being on this round threw me back out quite a ways. * * * I was out in the air and falling.

Q. You fell backwards down to the ground?

A. I fell down to the ground.”

This was a fall of twenty-five feet (p. 21), and the plaintiff testifies that he struck the tramway, which was seven feet two inches distant from the bottom of the ladder (p. 103).

That a man of sixty-eight years of age could fall backward a distance of twenty-five feet, and land *on his back* upon a rigid tramway, without breaking any bones or showing any perceptible bruises, is, we assert, impossible. Such a thing never happened since the beginning of the world, and it will not happen in the future. There is a presumption that things have happened according to the ordinary course of nature and the ordinary habits of life (Sec. 1963, Subdivision 28, Cal. C. C. P.), and there is a further rule of evidence to the effect that courts take judicial notice of the laws of nature. Applying the law of falling bodies and the law of gravitation (which are not statutory), it is not only

improbable, but it is impossible, that the plaintiff could have fallen in the way that he describes and not have had further external evidence of the fall.

IV.

THE VERDICT IS GROSSLY EXCESSIVE.

In denying that the verdict of the jury in this case is excessive, counsel asserts that the case was so tried by him that it would be impossible to find any evidence of an attempt to create a prejudice against the defendant. We do not believe that it is necessary to find any evidence of such an attempt in the record, for the size of the verdict itself is so great as to make it clear that there must have been prejudice if the verdict is to be accounted for at all. We do, however, call the attention of the court to the question asked the witness J. R. Heckman by counsel for plaintiff when Heckman was recalled for further cross-examination. This question is found on page 171 of the Transcript, as follows:

“Q. You have been an employer of labor for quite a while, Mr. Heckman? A. Yes, sir.”

Counsel would have the jury believe that any employer of labor, particularly a large employer of labor, such as Mr. Heckman while in the employ of the Alaska Packers' Association had been shown to be, must be a person as biased and unfair toward the employee as the defendant itself. This was not the sort of question which could easily be ob-

jected to, but it was of a nature to inflame the minds of the jury against the defendant.

The age of plaintiff is, of course, the strongest reason for a reversal in this case on the ground of excessive damages. In every case which carefully lays down the rule governing the elements to be considered in assessing damages for personal injuries or death, the courts take this factor into consideration.

In *Wiezoreck v. Ferris*, 176 Cal. 353, the case of *Houghkirk v. Delaware H. & L. Co.*, 92 N. Y. 219, is cited with approval, and the following excerpt from the latter case set forth:

“*The age and sex, and general health and intelligence of the person, with the situation and condition of the survivors, and their relations to the deceased,—these elements furnish some basis for judgment.*” (Italics ours.)

Inasmuch as the case at bar is not a death case, the only thing to be considered is the age, sex, general health and intelligence, and the earning capacity of the deceased, together with the extent of the injury. It is to be noted that the judgment which was reversed in the *Wiezorek* case on the ground of excessive damages was for \$10,000.

In *Louisville etc. Ry. Co. v. Stacker* (Tenn.), 6 S. W. 737, where the deceased was only of the age of fifty-seven years, as against sixty-eight years in the case at bar, a judgment of \$12,000 was reversed as excessive, the court saying:

“The age, condition, capacity of earning money, and expectation of life, are all to be considered.”

In *Chesapeake etc. Ry. Co. v. Dupee's Admr.* (Ky.), 67 S. W. 15, a judgment as small as \$500 was reversed where it appeared that the plaintiff was sixty-eight or seventy years of age and his injuries were not great. The court laid great emphasis in that case upon the age of the plaintiff.

Campbell v. Cornelius (Tenn.), 23 S. W. 117, is another case where the age of the plaintiff was considered. In it the verdict was for \$7800, and the plaintiff was seventy-four years of age. The court said:

“Plaintiff is shown to have been 74 years of age at the time he was injured, and, while he possessed more than ordinary vigor for one of that age, he is not entitled to as much as would be one in the meridian of life. He is by no means wholly disabled, though the evidence warrants the conclusion that he has suffered much pain, and that his health and working capacity are seriously impaired.”

In *Keim v. Gilmore & P. R. Co.* (Idaho), 131 Pac. 656, where the plaintiff was seventy-six years of age, the court cut down the amount of damages from \$10,000 to \$9,000, although the injuries suffered were, without question, very severe. The court in that case said upon the hearing:

“Without entering into a discussion of the evidence and the authorities cited, and from such examination, the court is of the opinion, in view of the circumstances of the case and

the age of the appellant, the judgment is excessive.”

In *Anderson v. Manhattan Ry. Co.*, 21 N. Y. Supp. 1, a verdict of \$5401.82 was held to be excessive, and was reduced to \$2500, where the plaintiff was sixty-nine years of age, the court basing the reduction in part upon the age of plaintiff.

Counsel contends that no judgment should be reversed as excessive where the injuries consist of injuries to the spine and nervous system. In support of such a contention, two excerpts from *13 Cyc.* are set forth. The theory upon which the cases cited in *Cyc.* proceed is that where there is an injury to the spine or nervous system, it is so difficult to determine the exact extent of the damage that the verdict of the jury will not readily be reversed. An entirely opposite conclusion, however, can be reached from the same circumstances. We believe that where the injuries consist of an alleged injury to the spine and an asserted derangement of the nervous system and where the symptoms of such injury are almost wholly subjective and extremely difficult of accurate ascertainment, the court should be more than ever careful about saddling upon a defendant an obviously unjust burden in the shape of a large verdict. There are numerous authorities which support our view. We shall cite only a few of them.

In the following cases, where the injury has consisted of a claimed derangement of the nervous

system, judgments have been reversed upon the ground that the verdicts were excessive:

Edwards v. Seattle etc. Ry. Co. (Wash.), 113 Pac. 563. In this case the court reduced a judgment, the amount of which does not appear in the report of the case, to \$5500, where the plaintiff, as a result of injuries, was suffering from neurasthenia, the court saying:

“The appellant complains of the amount of the verdict. The injured respondent at the time of the trial was suffering from neurasthenia, and this was the only objective symptom remaining from the injury that medical experts were able to discover.”

In *Schwartzbauer v. Great Northern Ry. Co.* (Minn.), 128 N. W. 286, a judgment for \$12,000 was reduced to \$8000. This reduction was made for the reason that it appeared from the record that there was a conflict of medical testimony as to whether or not the nervous condition caused by the accident would continue or not, this nervous condition being practically the only symptom that any ill effects had been suffered.

In *Becker v. Albany Ry. Co.*, 54 N. Y. Supp. 395, a judgment for \$10,000 was reduced to \$4,000 where the injuries consisted of an alleged derangement of the nervous system.

There are also numerous cases where injuries suffered by the plaintiff were to the spine, yet the judgment was reversed as excessive. One of these is *Hawkins v. Interurban Ry. Co.* (Iowa), 168 N. W.

234. In that case a verdict of \$10,000 was reduced on appeal to \$5000. In it plaintiff was fifty-five years of age at the time of the accident. He described the symptoms which he suffered at the time of the trial as being constant severe pain from the top of the shoulder blade to the base of the skull, and down his back, also loss of appetite, and was to some extent unable to sleep, took medicine for his stomach and bowels, and was unable to work for about sixty days. Some of the medical experts who testified at the trial were of the opinion that these symptoms would not be permanent, whereas other medical experts testified that they would. The court held that in view of the doubtful nature of the injuries and the conflict of the testimony, \$10,000 was excessive.

The authorities which we have just cited clearly show that the courts will reduce, as excessive, judgments in cases where the injuries are to the spine and nervous system.

We submit, for the reasons stated in our opening brief and herein, that the judgment of the court below should be reversed.

Dated, San Francisco,
November 5, 1921.

Respectfully submitted,

H. L. FAULKNER,

CHICKERING & GREGORY,

Attorneys for Plaintiff in Error.

No.

128708

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of the Application of ALBERT
SICHOFSKY, also known as ABRAM SICHOF-
SKY, for WRIT OF HABEAS CORPUS.

Transcript of Record.

**Upon Appeal from the United States District Court for
the Southern District of California,
Southern Division.**

FILED
JUN 8 1911
P. O. MONTAGUE
CLERK

No.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys.

For Petitioner and Appellant:

COOPER, COLLINGS & SHREVE, 708 Washington Building, Los Angeles, California.

For Respondents and Appellees:

ROBERT O'CONNOR, Esq., U. S. Attorney, Los Angeles, California.

IN THE DISTRICT COURT OF THE UNITED
STATES, IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

In the Matter of the Application)	
of ALBERT SICHOFSKY, also	)	CITATION ON
known as ABRAM SICHOFSKY,	)	APPEAL
for WRIT OF HABEAS)	
CORPUS;)	
)	

UNITED STATES OF AMERICA—SS.

THE PRESIDENT OF THE UNITED STATES,
to ROBERT O'CONNOR, Esq., United States
Attorney in and for the Southern District of Cali-
fornia, Greeting:

You are hereby cited and admonished to be and ap-
pear at the United States Circuit Court of Appeals,
for the Ninth Circuit, to be holden at the City of San
Francisco, in the State of California, within thirty
days from the date hereof, pursuant to an order allow-
ing an appeal of record in the clerk's office of the United
States District Court for the Southern District of Cali-
fornia, Southern Division, wherein Albert Sichofsky,
also known as Abram Sichofsky, is appellant and you
are appellee, to show cause, if any there be, why the
decree rendered against the said appellant, as in the said
order allowing appeal mentioned, should not be cor-
rected, and why speedy justice should not be done to
the parties in that behalf.

WITNESS the Hon. Benjamin F. Bledsoe, United States District Judge for the said District, this 2nd day of June, 1921.

Bledsoe,
United States District Judge.

[Endorsed]: No. 2991. IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIF. SOUTHERN DIVISION IN THE MATTER OF THE APPLICATION OF ALBERT SICHOFISKY, ALSO KNOWN AS ABRAM SICHOFISKY, FOR WRIT OF HABEAS CORPUS CITATION ON APPEAL Recied copy of within—6-2/21 Robert O'Connor U. S. Atty F. COOPER, COLLINGS & SHREVE ATTORNEYS AND COUNSELORS FOR APPELLANT AND PETITIONER 708 WASHINGTON BLDG. LOS ANGELES, CAL. PHONE 60277 Filed Jun 2 1921 Chas. N. Williams, Clerk Douglas Van Dyke Deputy.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE SOUTHERN DISTRICT
OF CALIFORNIA, SOUTHERN
DIVISION

In the Matter of the Application of)	
ALBERTO SICHOFISKY, also)	
known as and called ABRAHAM	)	PETITION
SICHOFISKY,	)	FOR WRIT
for)	
Writ of Habeas Corpus.)	
)	

To the Honorable District Court of the United States, in and for the Southern District of California,

Southern Division, and to Benjamin F. Bledsoe or Oscar M. Trippet, judges thereof:

The petition of Alberto Sichofsky, also known as and called Abraham Sichofsky, respectfully shows the court that he, the said Alberto Sichofsky, also known as Abraham Sichofsky, is imprisoned, detained, confined and restrained of his liberty in the county jail of Los Angeles County, by the Marshall of the United States Government, and that said imprisonment, detention, restraint and confinement are illegal; and that the illegality thereof consists in this, to wit:

That heretofore, to wit, on or about the 22d day of May, 1918, there was passed by the Congress of the United States, a law entitled "An Act to prevent in time of war departure from or entry into the United States contrary to the public safety," which act specifically provides:

(Sec. 1) (United States—entry or departure—restrictions—offenses.) That when the United States is at war, if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—

(a) For any alien to depart from or enter or attempt to depart from or enter the United States

except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe;

(b) For any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this Act;

(c) For any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(d) For any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or enter not issued and designed for such other person's use;

(e) For any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(f) For any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(g) For any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered permit,

or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid. (--Stat. L--)

Sec. 2 (Necessity of passport) That after such proclamation as is provided for by the preceding section has been made and published and while said proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport. (--Stat. L--)

Sec. 3 (Punishment) That any person who shall wilfully violate any of the provisions of this Act, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than \$10,000 or, if a natural person, imprisoned for not more than twenty years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment, or both; and any vehicle or any vessel, together with its or her appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States. (--Stat. L--)

Sec. 4 (Definitions -- "United States"--"Person")
That the term "United States" as used in this Act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

The word "person" as used herein shall be deemed to mean any individual, partnership, association, company, or other unincorporated body of individuals, or corporation, or body politic. (--Stat. L --)"

That thereafter and by virtue of said act, the proclamation was made. That at the time said proclamation was made the Government of the United States was at war with the Imperial German Government. That thereafter and on or about the 11th day of November, 1918, an armistice was signed between the United States Government and the Imperial German Government, and thereafter, with the consent and authority of the Senate of the United States, Woodrow Wilson, then President of the United States, and the person who had promulgated said proclamation, entered into peace negotiations with said Imperial German Government, That on or before the 1st day of July, 1920, the necessity for said act ceased, as said war was at an end. That in addition thereto, said Congress, as above set forth, on or about the 10th day of November, 1919, repealed said act above set forth by an act entitled "An Act to regulate further the entry of aliens into the United States", which act is as follows:

(Act of Nov. 10, 1919, Ch. 104, 41 Stat. L. 353.)
(Sec. 1.) (Entry of aliens -- regulations by President -- passports -- false statements -- forgery, etc.)

That if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the entry of aliens into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful--

(a) For any alien to enter or attempt to enter the United States except under such reasonable rules, regulations and orders, and subject to such passport, vise, or other limitations and exceptions as the President shall prescribe;

(b) For any person to transport or attempt to transport into the United States another person with knowledge or reasonable cause to believe that the entry of such other person is forbidden by this Act;

(c) For any person knowingly to make any false statement in an application for a passport or other permission to enter the United States with intent to induce or secure the granting of such permission, either for himself or for another;

(d) For any person knowingly to furnish or attempt to furnish or assist in furnishing to another a visseed passport or other permit or evidence of permission to enter, not issued and designed for such other person's use;

(e) For any person knowingly to use or attempt to use any visseed passport or other permit or evidence of permission to enter not issued and designated for his use;

(f) For any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any passport, vise or other permit or evidence of permission to enter the United States;

(g) For any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered passport, permit, or evidence of permission, or any passport, permit, or evidence of permission, which, though originally valid, has become or been made void or invalid. (41 Stat. L. 353)

Sec. 2 (Penalties and forfeitures) That any person who shall wilfully violate any of the provisions of this Act, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than \$5,000, or, if a natural person, imprisoned for not more than five years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment, or both; and any vehicle or any vessel, together with its or her appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States. (41 Stat. L. 353)

Sec. 3. (Definitions -- "United States"--"person") That the term "United States" as used in this Act includes the Canal Zone and all territory and waters, continental or insular, subject to the jurisdiction of the United States.

The word "person" as used herein shall be deemed to mean any individual, partnership, association, company, or other unincorporated body of individuals, or corporation, or body politic. (41 Stat. L. 354)

Sec. 4. (Appropriation) That in order to carry out the purposes and provisions of this Act the sum of \$600,000 is hereby appropriated (41 Stat. L. 354)

Sec. 5. (Act when in effect.) That this Act shall take effect upon the date when the provisions of the Act of Congress approved the 22d day of May, 1918, entitled "An Act to prevent in time of war departure from and entry into the United States, contrary to the public safety," shall cease to be operative, and shall continue in force and effect until and including the 4th day of March, 1921. (41 Stat. L. 354)

which act repealed the act above specified. That regardless of such fact, and on or about the 1st day of October, 1920, an indictment was found in said Federal Court, charging petitioner herein with the violation of the Act of May 22, 1918, as set forth in said indictment, a copy of which is hereto attached, marked Exhibit A, incorporated in and made a part of this petition.

That thereafter at a stated term of the United States District Court for the Southern District of California, Southern Division, and on the 21st day of March, 1921, defendant entered a plea of guilty to the charge contained in the indictment, and was by said Court sentenced to be confined in the penitentiary at McNeill's Island, for the term of three (3) years, and in addition thereto was fined the sum of Fifteen Hundred (\$1500.00) Dollars. That thereupon a judgment was made by said Court, imposing said sentence above specified, which judgment was illegal void and beyond the jurisdiction of the Court. That thereafter a commitment was issued out of said Court, as shown by a copy of the Certificate of the Clerk hereto attached, marked Exhibit B, incorporated in and made a part of this petition, which commitment was illegal and void for the reasons above set forth; and which illegal commitment was placed in the hands of the United States Marshal. That thereafter, and while said commitment was in the hands of the United States Marshal, and while said Marshal was detaining the petitioner herein under and by virtue of said commitment, said Court made an illegal and unjust order concerning the custody of said petitioner, as shown by the copy of said order hereto attached, marked Exhibit C, incorporated in and made a part of this petition.

That after said order issued, said prisoner, your petitioner, was illegally transported to the County Jail of Los Angeles County by said Marshal, and by said Marshal, under said order, was turned over to the Sheriff of Los Angeles County, and while in the cus-

tody of the Sheriff of Los Angeles County, and against the objections, and over the protests of your petitioner, said petitioner was tried for the offense of grand larceny by the Superior Court of Los Angeles County, before Hon. Sidney N. Reeve, Judge thereof, and after being so tried, was convicted by said Court and sentenced to serve a term of Ten (10) years upon two (2) separate counts of grand larceny, which sentence and judgment were to run consecutively. That after the expiration of the fifteen (15) day period set forth in the order marked Exhibit C, above referred to, the United States District Court further illegally and unlawfully stayed execution, and execution is now being stayed. That as well, execution in the State Court is also now being stayed, and said defendant, your petitioner is now in the custody of the Sheriff of said Los Angeles County, having been remanded to said Sheriff by said Superior Court.

That from the judgment of conviction in said State Court above referred to, your petitioner has appealed to the District Court of the State of California, from said conviction, and under and by virtue of said appeal said defendant has certain rights. That from the facts above set forth your petitioner alleges that said judgment of said United States District Court was illegal for the reason that there was no law in existence at the time said judgment was pronounced. That if said law was in existence that the United States Federal Court lost jurisdiction of this defendant by indefinitely suspending sentence in said matter, and releasing said

defendant, your petitioner, to the jurisdiction of the State Court, and that for such reason that it should be declared by this Court that any pretended holding by said Marshal, or said Sheriff as the representative of said Marshal, under and by virtue of said judgment of conviction in the said United States Court, is illegal and void.

That no other petition for a writ of Habeas Corpus has been filed in this or any other Court for the facts herein stated.

WHEREFORE, your petitioner prays that a writ of Habeas Corpus be granted, directed to the United States Marshal for the Southern District of California, and the Sheriff of Los Angeles County, as the representative of said United States Marshal, commanding them to have the body of Alberto Sichofsky, also known as Abram Sichofsky, before said Court, at a time and place therein to be specified, to do and receive what shall then and there be considered by said Court, concerning said Alberto Sichofsky, together with the time and cause of his detention, and said writ; and that Alberto Sichofsky, also known and called Abram Sichofsky, be restored to his liberty.

Albert Shichofsky

Petitioner

By John S Cooper Atty

John S Cooper

Cooper, Collings & Shreve

Attorneys for petitioner

Dated: April 29, 1921

EXHIBIT "A"

No 1_____

Filed_____

Vio. Act. May 22, 1918, and Presidential Proclamation of August 6, 1918, Entering United States without a passport.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
SOUTHERN DIVISION.

At a stated term of said Court begun and holden at the city of Los Angeles, County of Los Angeles, within the Southern Division of the Southern District of California, on the second Monday of July, in the year of our Lord one thousand nine hundred and twenty;

The Grand Jurors of the United States of America, duly chosen, selected and sworn, within and for the division and district aforesaid, on their oath present:

That ABRAM SICHOFSKY, alias Alberto Sichofsky, alias Max Fimen, alias Carlos Nunn, whose full and true name is, other than as herein stated, to the Grand Jurors unknown, late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the twenty-third day of August, A. D. 1920, when the United States was at war with the Imperial German Government, at Tia Juana, County of San Diego, within the State and Southern Division of the Southern District of California, and within the jurisdiction of the United States and this Honorable Court, did knowingly, wilfully, unlawfully and felon-

iously enter, and attempt to enter, the United States from a foreign country, to-wit: The Republic of Mexico, without then and there bearing and having in his possession a passport duly visæd in accordance with the terms of Section 31 of an Executive Order dated August 8, 1918, issued pursuant to an Act of Congress approved May 22, 1918, entitled: "An Act to prevent, in time of war, departure from and entry into the United States, contrary to public safety", and supplemental to the Presidential Proclamation of August 8, 1918, the said ABRAM SICHOFSKY, alias Alberto Sichofsky, Alias Max Fimen, alias Carlos Nunn, being then and there a male citizen of Poland of the age of sixteen years and over;

Contrary to the form of the statute in such case made and provided against the peace and dignity of the said United States.

Robert O'Connor
United States Attorney.
Gordon Lawson.
Asst. U. S. Attorney.

EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT
 IN AND FOR THE SOUTHERN DISTRICT
 OF CALIFORNIA, SOUTHERN
 DIVISION.

---o0o---

UNITED STATES OF)	
AMERICA,)	
)	
)	
)	
Plaintiff,)	
- vs -	)	No. 2354—Crim.
)	
ALBERTO SICHOFSKY, etc.,)	
)	
Defendant.)	

---o0o---

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify that in the above entitled case on the 21st day of March, A. D. 1921, the defendant, Alberto Sichofsky, charged as Abram Sichofsky, alias Alberto Sichofsky, alias Max Finnen, Alias Carlos Munn, entered a plea of Guilty as charged in the indictment and that on the 22nd day of March, 1921, the defendant was sentenced to be confined in the Federal Penitentiary at McNeil Island for a term of three (3) years and that, thereafter on said 22nd day of March, 1921, a final commitment was issued pursuant to said judgment and sentence and said commitment

was delivered to the United States Marshal to be executed by him.

San Diego, California, March 28, 1921.

CHAS. N. WILLIAMS

Clerk United States District Court,

For the Southern District of California

(S
E
A
L)

EXHIBIT "C"

IN THE DISTRICT COURT OF THE UNITED
STATES, IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

---o0o---

UNITED STATES OF AMERICA,)

Plaintiff.)

- vs -

ABRAM SICHOFSKY,)

Defendant.)

) ORDER

---o0o---

WHEREAS, it appears to the satisfaction of this Court by the representation made in open court by Thomas Lee Woolwine through his deputy, A. H. Van Cott, the said Thomas Lee Woolwine and A. H. Van Cott being District Attorney and Deputy District Attorney in and for the County of Los Angeles, State of California, respectively, that the above named defend-

ant has been duly and regularly indicted by the Grand Jury of the County of Los Angeles, State of California, for the crimes of Grand Larceny and Embezzlement and said indictment has been returned by the said Grand Jury; that said defendant has been duly arraigned and entered a plea to said indictment and said cause is set for trial in Los Angeles County for this date, and good cause therefrom appearing to this Court,

IT IS HEREBY ORDERED that the execution of the sentence heretofore imposed on the above named defendant after conviction duly had in the above entitled cause be and hereby is stayed for the period of fifteen days.

IT IS FURTHER ORDERED that the United States Marshal take the above named defendant to the Hall of Justice, to the Court-room thereof, in the City of Los Angeles, County of Los Angeles, State of California at such times as his presence in the proceedings there pending against him under the said indictment in the Superior Court of the State of California, in and for the County of Los Angeles, shall be required. and the said Marshal is further ordered to take the said defendant, Abram Sichofsky, from the County Jail of the County of San Diego, to the County Jail of the County of Los Angeles, State of California, and to keep the said defendant in his custody for the purposes herein states, and at the expense of the county of Los Angeles, State of California, until the further order of this court.

Done in open Court this 29th day of March, A.D., 1921.

(Signed) Bledsoe
United States District Judge.

Endorsed.

No. 2354 Crim. In the District Court of the United States for the Southern District of California, Southern Division, United States of America, Plaintiff, vs. Abram Sichofsky, Defendant. Order. Filed March 29, 1921. Chas. N. Williams, Clerk.

I Chas. N. Williams, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing to be a full, true and correct copy of an original order signed and filed on the 29th day of March, 1921, in the cause entitled United States of America, Plaintiff, vs. Abram Sichofsky, defendant. No. 2354 Crim. as the same remains on file and of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and seal this 29th day of March, A. D. 1921.

CHAS. N. WILLIAMS

(S Clerk U. S. District Court,
E For the Southern District of California.

A

L)

UNITED STATES OF AMERICA)
STATE OF CALIFORNIA) SS
COUNTY OF LOS ANGELES)

Alberto Sichofsky, also known as Abram Sichofsky, being duly sworn, says that he is the petitioner named in the foregoing petition, that he has heard read the

said petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

Alberto Sichofsky

SUBSCRIBED AND SWORN TO before me this 28 day of April, 1921

(Seal)

John S Cooper

Notary Public in and for the County of Los Angeles,
State of California

[Endorsed]: *No.* 2991 Cr. IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION In the matter of the application of Alberto Sichofsky, also known as Abram Sichofsky, for Writ of Habeas Corpus. Petition for Writ Filed Apr 29, 1921 Chas N. Williams, Clerk Douglas Van Dyke Deputy COOPER, COLLINGS & SHREVE ATTORNEYS AND COUNSELORS 708 WASHINGTON BLDG. LOS ANGELES, CAL. PHONE 60277 for petitioner

At a stated term, to wit: the January TERM, A. D. 1921, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the court room thereof, in the City of Los Angeles, on Monday the 2nd day of May in the year of our Lord one thousand nine hundred and twenty one.

PRESENT:

The Honorable Oscar A. Trippet, District Judge.

United States of America,)	
Plaintiff,)	
vs.	)	No. 2991 Crim. S. D.
)	
Abram Sichofski, Defendant.)	

This cause coming on this day on a Petition for a Writ of Habeas Corpus; J. S. Cooper, Esq., appearing as counsel for the Petitioner; and good cause appearing therefor, it is hereby ordered that a Writ of Habeas Corpus issue directed to Wm. I. Traeger, Sheriff of Los Angeles County and C. T. Walton, U. S. Marshal for the Southern District of California, returnable on May 9, 1921, before Honorable Benjamin F. Bledsoe, United States District Judge.

IN THE UNITED STATES DISTRICT COURT IN
AND FOR THE SOUTHERN DISTRICT OF
CALIFORNIA SOUTHERN
DIVISION

In the Matter of the Application of)	
)	
Alberto Sichofsky, also known as)	
	)	WRIT
Abram, Sichofsky, for a Writ of)	
)	
Habeas Corpus)	

THE PEOPLE OF THE UNITED STATES OF AMERICA to C. T. Walton, United States Marshal, and William Traeger, Sheriff.

GREETING:

We command you, that you have the body of Alberto Sichofsky, also known and called Abram Sichofsky, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name said Alberto Sichofsky shall be called or charged, before BENJAMIN F. BLEDSOE, Judge of the United States District Court in and for the Southern District of California, Southern Division, at the Court Room of said Court, in the City of Los Angeles, on the 9 day of May, 1921, at 2 o'clock in the afternoon of that day, to do and receive what shall then and there be considered concerning the said Alberto Sichofsky.

And have you then and there this writ.

Witness Hon. Oscar A. Trippet, judge of the said United States District Court, at the Court Room thereof, in the County of Los Angeles, this 2 day of May, 1921.

ATTEST, my hand and the seal of said Court, the day and year last above written.

(Seal)

CHAS. N. WILLIAMS,

Clerk

By R S Zimmerman, Deputy Clerk

[Endorsed]: No. 2991 Cr. IN THE UNITED STATES DISTRICT COURT IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION In the matter of the Petition of Alberto Sichofsky, also known as Abram Sichofsky, for WRIT OF HABEAS CORPUS

WRIT OF HABEAS CORPUS Filed May 9, 1921
Chas. N. Williams, Clerk By Wm U Handy Deputy
Clerk COOPER, COLLINGS & SHREVE ATTOR-
NEYS AND COUNSELORS 708 WASHINGTON
BLDG. LOS ANGELES, CAL. PHONE 60277

COUNTY OF LOS ANGELES) SS
STATE OF CALIFORNIA)

I, William I Traeger, Sheriff of the County of Los Angeles, State of California, do herein return that before the coming to me of the within writ, the said Albert Sichofsky was committed to my custody by United States Marshal Walton, who advised the District Attorney he could proceed against him in the Superior Courts for Grand Larceny committed in this County, he, the said Sichofsky, was tried in Department 17 of the Superior Court, found guilty 21st day of April 1921 on two counts, copies of the commitments are here attached.

WM I TRAEGER SHERIFF

BY Al. Manning

Deputy.

Copy

IN THE SUPERIOR COURT OF THE COUNTY
OF LOS ANGELES STATE OF
CALIFORNIA

Present: Hon. Sidney N Reeve Judge

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

Albert Sichofsky

No. 15868

The District Attorney, with the Defendant and his counsel, Messrs Cooper, Collings & Shreve came into

Court. The Defendant was duly informed by the Court of the nature of the indictment against him, for the crime of Grand Larceny, a felony committed on or about the 18th day of November 1920, of his arraignment and plea of "not guilty as charged in said Count 1 of Indictment," of his trial and the verdict of the jury, on the 13th day of April 1921 "Guilty Grand Larceny, as charged in the first count of the indictment. The Defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him. To which he replied that he had none. And no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its Judgment: That whereas the said Albert Sichofsky, having been duly found Guilty in this Court of the crime of Grand Larceny

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the said Albert Sichofsky be punished by imprisonment in the State Prison of the State of California at San Quentin, for the term prescribed by law

The Defendant was then remanded to the custody of the Sheriff of the County of Los Angeles, to be by him delivered into the custody of the Warden of said state Prison of the State of California at San Quentin.

Done in open Court this 21st day of April 1921

OFFICE OF THE COUNTY CLERK)
of the said County of Los Angeles)

I, L E Lampton, County Clerk, of the said County of Los Angeles, and ex-officio Clerk of the Superior

Court thereof, do hereby certify the foregoing to be a true and correct copy of the Judgment duly made and entered on the minutes of the Superior Court in the above entitled action, and that I have compared the same with the original and that the same is a correct transcript therefrom and of the whole thereof.

ATTEST my hand and the seal of the said Superior Court, this 21st day of April 1921., A. D.

L E Lampton Clerk

(Seal)

By E L Kinney Deputy Clerk

In the Superior Court of the State of California in and
for the County of Los Angeles

THE PEOPLE OF THE STATE OF)
CALIFORNIA)

vs.

) No 15868

Albert Sichofsky

Defendant

The people of the State of California, to the Sheriff of the said County of Los Angeles, and the Warden and Officers in charge of the State Prison of the State of California, at San Quentin, Greeting:

WHEREAS, the above named Defendant having been duly found guilty in the Superior Court in and for the said County of Los Angeles, of the crime of Grand Larceny and judgment having been pronounced against him that he be punished by imprisonment in the State Prison of the State of California at San Quentin for the term prescribed by law all of which appearing to us of record, and a certified copy of the Judgment being endorsed hereon and made a part hereof; now, this is to command you, the said Sheriff of the said

County of Los Angeles, to take and keep and safely deliver the said Defendant into the custody of the said Warden or other officer in charge of the State Prison of the State of California at San Quentin at your earliest convenience.

And this is to command you, the said Warden and other officers in charge of the State Prison of the State of California at San Quentin, to receive of and from the Sheriff of the said County of Los Angeles, the said Defendant convicted and sentenced as aforesaid, and he, the said Defendant, keep and imprison in the State Prison of the State of California at San Quentin, for the term prescribed

And these presents shall be authority for the same. Herein fail not.

WITNESS, Hon Sidney N Reeve Judge of the Superior Court of the said County of Los Angeles, this 21st day of April 1921

Attest my hand and the seal of said Court, the day and year last above written.

L E Lampton, Clerk

By E L Kinney Deputy Clerk

Copy

No 15868

SUPERIOR COURT
COUNTY OF LOS ANGELES

The People of the State of California

vs.

Albert Sichofsky

Defendant

Commitment to State Prison San Quentin

COPY

IN THE SUPERIOR COURT OF THE COUNTY
OF LOS ANGELES STATE OF
CALIFORNIA

Present: Hon Sidney N. Reeve

Judge.

THE PEOPLE OF THE STATE OF)

CALIFORNIA)

No 15868

vs.)

Albert Sichofsky

The District Attorney, with the Defendant and his counsel, Messrs Cooper, Collings & Shreve came into Court. The Defendant was duly informed by the Court of the nature of the indictment against him, for the crime of Grand Larceny a felony committed on or about the 18th day of November 1920, of his arraignment and plea of "not guilty as charged in said Count 3 of indictment" of his trial and the verdict of the jury, on the 13th day of April 191 , "Guilty of Grand larceny, as charged in the third count of the indictment The Defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him. To which he replied that he had none. And no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its Judgment: That whereas the said Albert Sichofsky, having been duly found Guilty in this Court of the crime of Grand Larceny

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the said Albert Sichofsky be punished by imprisonment in the State Prison of the

State of California at San Quentin, for the term prescribed by law

The Defendant was then remanded to the custody of the Warden of the County of Los Angeles, to be by him delivered into the custody of the proper officers of said State Prison of the State of California at San Quentin.

Done in open Court this 21st day of April 1921

To run consecutively with judgment and sentence as entered in count 1, Case #15868

OFFICE OF THE COUNTY CLERK)
of the said County of Los Angeles)

I, L E Lampton, County Clerk of the said County of Los Angeles, and ex-officio Clerk of the Superior Court thereof, do hereby certify the foregoing to be a true and correct copy of the Judgment duly made and entered on the minutes of the Superior Court in the above entitled action, and that I have compared the same with the original, and that the same is a correct transcript therefrom and of the whole thereof.

ATTEST my hand and the seal of the said Superior Court, this 21st day of April 1921, A. D.

L E Lampton Clerk

(Seal)

By E L Kinney Deputy Clerk

In the Superior Court of the State of California in and
for the County of Los Angeles

THE PEOPLE OF THE STATE OF)
CALIFORNIA) No 15868
vs.)

Albert Sichofsky

Defendant

The people of the State of California, to the Sheriff of the said County of Los Angeles, and the Warden and Officers in charge of the State Prison of the State of California, at San Quentin, Greeting:

Whereas, the above named Defendant having duly been found guilty in the Superior Court in and for the said County of Los Angeles, of the crime of Grand Larceny, a felony and judgment having been pronounced against him that he be punished by imprisonment in the State Prison of the State of California at San Quentin for the term prescribed by law all of which appearing to us of record, and a certified copy of the Judgment being endorsed hereon and made a part hereof; now, this is to command you, the said Sheriff of the said County of Los Angeles, to take and keep and safely deliver the said Defendant into the custody of the said Warden or other officer in charge of the State Prison of the State of California at San Quentin at your earliest convenience.

And this is to command you, the said Warden and other officers in charge of the State Prison of the State of California at San Quentin, to receive of and from the Sheriff of the said County of Los Angeles, the said Defendant convicted and sentenced as aforesaid, and he, the said Defendant, keep and imprison in the State Prison of the State of California at San Quentin, for the term prescribed by law

And these presents shall be authority for the same. Herein fail not.

WITNESS, Hon Sidney N Reeve Judge of the Superior Court of the said County of Los Angeles, this 21st day of April 1921

ATTEST my hand and the seal of said Court, the day and year last above written.

L E Lampton Clerk.

By E L Kinney Deputy Clerk

No. 15868

SUPERIOR COURT
COUNTY OF LOS ANGELES

The People of the State of California

vs.

Albert Sichofsky

Defendant

Commitment to State Prison San Quentin

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

In the Matter of the)	
)	
Application of Abram Sichofsky,	)	2991 Crim.
)	
for Writ of Habeas Corpus.)	
)	

: : : : : : : : : : : :

J. Robert O'Connor, Esq., United States Attorney
and Thos. F. Green, Asst. United States Attorney for
the Government.

Messrs. Cooper, Collings & Shreve of Los Angeles, Cal., for the Petitioner.

Bledsoe, District Judge: -- The contentions advanced by petitioner herein as a reason why he should be discharged from his present custody, maintained by the United States Marshal in virtue of a commitment heretofore issued out of this court following his plea of guilty as for a violation of law of the United States, may be briefly stated and determined.

The indictment to which petitioner pleaded guilty charged him, a citizen of Poland, with having, on or about the twenty-third day of August, 1920, entered and attempted to enter the United States from the Republic of Mexico, "without then and there bearing and having in his possession a passport duly visaed in accordance with the terms of Sec. 31 of an Executive Order dated August 8, 1918 issued pursuant to an Act of Congress approved May 22, 1918", etc. (40 Stat. L. 559).

There is no specific averment upon the subject, but in the absence thereof and in view of the fact that he was tried and found guilty before the Superior Court of the County of Los Angeles of the crime of grand larceny, committed in the County of Los Angeles "on or about the eighteenth day of November, 1920" it must be assumed that he did in fact *enter* the United States, and that the crime committed by him was not merely that of "an attempt to enter".

After this court, on March 22, 1921, had pronounced judgment upon petitioner, by sentencing him to three

years imprisonment in the Federal penitentiary, and to pay a fine in the sum of \$1500.00, upon application made by the District Attorney of Los Angeles County because of an indictment pending in the Superior Court of that County, an order was made by this court on March 29, 1921, staying the execution of the sentence adjudged herein for the period of fifteen days; and it was further ordered that "the United States Marshal take the above named defendant to the Hall of Justice, to the Court Room thereof, in the City of Los Angeles, County of Los Angeles, State of California, at such times as his presence in the proceedings there pending against him under said indictment in the Superior Court of the State of California in and for said county of Los Angeles shall be required". It was further required in said order that the Marshal "keep the said defendant in his custody for the purposes herein stated". Pursuant to such order, and presumably in complete accordance therewith, the petitioner was taken to the Superior Court of Los Angeles County, there suffered trial, was regularly convicted and sentenced, etc. Since the first order staying execution, pending the hearing and determination of this writ, etc., upon the application or with the consent of petitioner, further stays have been granted and he is now in consequence thereof, still in the custody of the United States Marshal in the County Jail in Los Angeles.

The first claim advanced is that there is no law justifying the indictment or subsequent proceedings had against petitioner in this court. This is based upon

three propositions; first, that the Act of May 22, 1918, hereinabove referred to, was by its terms limited to the period "when the United States is at war", and that in all substantial aspects of the case, the war having ceased and determined, the statute became inoperative and ineffective for any purpose before petitioner came into this country. The second contention is that the statute was repealed by implication in virtue of the Act of November 10, 1919, (41 Stat. L. 353.) purporting to enact a new law upon the identical subject matter and which new law, by its own terms, was to continue in force and effect only "until and including the fourth day of March, 1921", a point of time anterior to the plea of guilty and pronouncement of judgment on petitioner herein. The third contention is that the Act was expressly repealed by the joint resolution of Congress, adopted March 3, 1921, (Sec. 3115 - 14f - Comp. Stats.) repealing certain designated "War Time Acts."

I think it clear, that this court may not now say that the war has ended, even within the meaning of that phrase as used in the statute of May 22, 1918. It is common knowledge, of course, that no treaty of peace has been ratified by this government, that no repeal of the declaration of war has been had, and that, subject only to the terms of an Armistice, American troops are still on foreign soil. In such event, as I understand the law, there is no formal state of peace. *United States v. Anderson*, 9 Wall. 56; *Hijo v. United States*, 194 U. S. 315. Neither may the court say, in my judgment, that substantially and operatively we

are at peace and that therefore the validity possessed by the statute during war time has failed and that the reason for its original enactment has ceased. Conceding, under the decision of *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, that the court might hold a statute inoperative on the theory that, the reason for the statute having ceased the statute itself would cease, nevertheless, I cannot accept the minor premise of the syllogism necessary to be entertained. The reason has not yet ceased. We have as yet no peace with Germany. Our troops are yet upon her soil. The court may not say, with the completeness and satisfaction that seems to be required, that there is no longer necessity for a watchfulness of the entry of immigrants across our border. Until the court may say that, it must hold that the wisdom of Congress, made manifest by the statute, must control and limit the rule of individual conduct. We do not have here the "clear case" which must exist before the court may thus hold a law of the United States inoperative. *Hamilton v. Kentucky Distilleries Co.*, *supra*.

The joint resolution repealing the War Time Acts, herein above referred to, itself constitutes a determination on the part of Congress that, for purposes of construction of relevant statutes, the war "terminated on the date" when that resolution became "effective", to-wit, March 3, 1921. The Act of November 10, 1919, by its own terms was to become effective only upon the date when the Act of May 22, 1918, "shall cease to be operative". The last mentioned Act has ceased

to be operative, not in virtue of a return to peace, but only in virtue of the provisions of the aforesaid Joint Resolution of March 3, 1921. Therefore, the Act of November 10, 1919, had not yet become effective when petitioner entered this country. His action being in violation of the Act of May 22, 1918, may even now be punished in virtue of the saving clause affixed to the Joint Resolution repealing that Act.

This joint resolution enacted in the last days of the 66th Congress repealing certain war time acts, carried with it a saving clause to the effect that nothing therein contained should be held "to exempt from prosecution or to relieve from punishment" any offense theretofore committed in violation of the acts therein repealed or referred to, etc. In view of the express and positive provisions of Sec. 13 of the Revised Statutes, this saving clause was hardly necessary. *U. S. v. Reisinger*, 128 U. S. 398. Its insertion, however, makes it clear and indubitable that Congress was intending to make punishment possible for those who had violated the law previous to its repeal.

That it should be given effect in this wise is too plain for argument or extended discussion. Counsel make the point, however, that though by the terms of the saving clause the act itself was kept in force and effect, yet nothing in the saving clause served to keep in force and effect the proclamations or regulations of the President issued under and pursuant to the act, and that in consequence, the offense charged herein being in violation of a regulation or proclamation issued

by the President in conformity to the requirements of the act, the saving clause did not operate as a preventive of total and unqualified repeal. There is more of form in this contention, however, than of substance. The Act of May 22, 1918, provides definitely and specifically "that when the United States is at war, if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful –

"(a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe".

It is obvious then that Congress was intending to declare that in virtue of the exigencies brought about by the war, as long as the President deemed it necessary and should make proclamation thereof, it should be unlawful to enter the country except in virtue of the regulations to be established by him. No entry at all could be lawful, as long as the condition of danger attached, to be determined by the President, except in compliance with his instructions and regulations. This was followed (Sec. 3) by the provision that any person who should willfully "violate any of the provisions of this Act or of any order or proclamation of the Presi-

dent promulgated, or of any permit, rule, or regulation issued thereunder" should upon conviction be punished, etc.

Petitioner's argument, in effect, with respect to pending prosecutions, is that though there was no repeal of the law, because of the saving clause, yet there was a repeal of the Presidential proclamations and regulations because they were not specifically mentioned in and covered by the saving clause. The law possessed no efficacy, however, except as the proclamation or regulations duly promulgated by the President gave it efficacy, and to hold, with respect to prosecutions already begun or violations already had, that the law remained but that the proclamation and regulations were repealed, would be to retain the shadow and disregard the substance; to keep the incident and destroy the principal. Such cannot be the construction to be accorded to the action taken. The violation charged herein, and for which petitioner must stand for judgment, was not of a proclamation of the President or regulations promulgated by him, but a violation of a law which said that no entry might be had save under enumerated circumstances. In this wise it is clear that any saving clause which applied to the law itself, would suffice to support and justify any prosecution had and maintained under the law.

I conclude then that ample authority existed for the rendering of the indictment herein and that the court had jurisdiction, in virtue of petitioner's plea of guilty, to pronounce the judgment under which he is held.

It is asserted, however, that the court lost all of its jurisdiction thus acquired in virtue of the order made permitting the petitioner, all the while in custody of the United States Marshal, to be tried in the State court as for the crime of grand larceny. It may be true, yet this court having no concern with the matter does not express any opinion thereon, that in view of the jurisdiction of this court attaching to the person of the defendant in the behalf and respects hereinabove enumerated and referred to, the Superior Court of the State of California could and did acquire no jurisdiction to try him, at the time it did, as for an asserted violation of the law of the State of California. If that be so and if that court lacked jurisdiction, it will be so determined in appropriate tribunals. I discover nothing, however, based either upon reason or authority, from which it may now be adjudged that the action of this court in temporarily staying the execution of the judgment of this court, served to divest this court of jurisdiction to require petitioner to stand for judgment as for the admitted violation of the Federal law. It would be a strange and bold assertion, in my judgment, for this court, possessing the amplest jurisdiction as above referred to, to hold that it had completely divested itself of all jurisdiction in the premises merely by an order staying execution. I see nothing in the decision relied upon by petitioner (*In re Jennings*, 118 Fed. 479) requiring such conclusion.

It is obvious, of course, that as against the protest of the petitioner, which protest must be considered as

having been impliedly made, the court could not, by granting a stay of execution, add to the length of time that he should be deprived of his liberty. In that behalf, I am persuaded that petitioner is entitled to have subtracted from the total period of incarceration adjudged against him, the length of time elapsed since the rendering of the judgment herein. In re Jennings, *supra*.

The order of the court therefore will be that the writ of habeas corpus herein is discharged and the prisoner is remanded to the custody of the United States Marshal to abide the judgment of this court heretofore delivered herein. The commitment eventuating from that judgment, being a process emanating from this very court and being still within the control of this court, should now be recalled and amended to conform to the opinion and judgment rendered necessary herein. An order will be entered therefore, recalling the commitment and decreeing its amendment to the effect that the term of imprisonment heretofore adjudged upon petitioner will begin to run as from the date of pronouncement of the aforementioned judgment herein May 31, 1921.

[Endorsed]: No 2991 Crim. United States District Court Southern District of California Southern Division United States of America vs. Abram Sichofsky Opinion of Court Filed May 31, 1921 By Chas. N. Williams, Clerk Wm. U. Handy, deputy

IN THE DISTRICT COURT OF THE UNITED
STATES, IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

In the Matter of the Application)	
of ALBERT SICHOFSKY, also	)	PETITION
known as ABRAM SICHOFSKY,	)	FOR APPEAL.
for WRIT OF HABEAS)	
CORPUS.)	
)	

Comes now Albert Sichofsky, also known as Abram Sichofsky, the petitioner above named, and the appellant herein, and says:

That on the 31st day of May the above court made and entered its order and decree denying the petition for a writ of habeas corpus, as prayed for, in which said order and decree in said entitled cause certain errors were made as to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herewith.

WHEREFORE, petitioner prays that an appeal may be granted in his behalf to the Circuit Court of Appeals of the United States, for the Ninth Circuit thereof, for the correction of the errors so complained of, and further that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals, for the Ninth Circuit thereof.

Dated at Los Angeles, California, May 31, 1921.

John S Cooper

Attorneys for Petitioner and Appellant herein.

[Endorsed]: No. 2991 Crim IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION In the Matter of the Application of ALBERT SICHOFISKY, also known as ABRAM SICHOFISKY, for WRIT OF HABEAS CORPUS. PETITION FOR APPEAL Received copy of the — 6-1/21 Robert O'Connor U. S. Attorney F. Filed Jun 1 1921 Chas N. Williams, Clerk By R S Zimmerman Deputy Clerk. COOPER, COLLINGS & SHREVE ATTORNEYS AND COUNSELORS 708 WASHINGTON BLDG. LOS ANGELES, CAL. PHONE 60277

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

In the Matter of the Application	)	ORDER
of ALBERT SICHOFISKY, also	)	ALLOWING
known as ABRAM SICHOFISKY,	)	PETITION
for WRIT OF HABEAS	)	FOR APPEAL
CORPUS.)	
)	

On this the 1st day of June, 1921, came Albert Sichofsky, also known as Abram Sichofsky, by his attorneys, Cooper, Collings & Shreve, and having previously filed same herein, did present to this court his

petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, intended to be urged and prosecuted by him, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent and transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper;

NOW, THEREFORE, on consideration thereof, this Court hereby allows the appeal hereby prayed for, and orders execution and remand stayed pending the hearing of the said cause in the said United States Circuit Court of Appeals for the Ninth Circuit. And further said Court does certify that no evidence was taken upon said hearing. That all the papers used upon said hearing were a petition for the writ, the return of the writ; and a Consideration by the Court of the papers in U. S. v. Sichofsky referred to in the opinion filed herein, and the opinion of said Court which opinion is requested in said Praecipe. Appellant to give bond in sum of \$250.

Dated at Los Angeles, California, June 1st, 1921.

Bledsoe

Judge

U. S. District Court.

[Endorsed]: No. 2991 IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION In the Matter of the

Application of ALBERT SICHOFSKY, also known as ABRAM SICHOFSKY for WRIT OF HABEAS CORPUS ORDER ALLOWING PETITION FOR APPEAL Orig rec'd 6 - 1/21 Robert O'Connor U. S. Attorney F. Filed Jun 2 1921 Chas. N. Williams, Clerk By Wm U Handy Deputy Clerk. COOPER, COLLINGS & SHREVE ATTORNEYS AND COUNSELORS 708 WASHINGTON BLDG. LOS ANGELES, CAL. PHONE 60277

IN THE DISTRICT COURT OF THE UNITED
STATES, IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

	) No.
In the Matter of the Application)	
of ALBERT SICHOFSKY, also)	NOTICE OF
known as ABRAM SICHOFSKY,)	APPEAL
for WRIT OF HABEAS)	
CORPUS.)	
)	

To the Clerk of the Above-entitled Court, and to the Hon. Robt. O'Connor, United States District Attorney in and for the Southern District of California, and to said Court and the Hon. Benjamin F. Bledsoe, Judge thereof:

You and each of you will please take notice that Albert Sichofsky, also known as Abram Sichofsky, does hereby appeal to the Circuit Court of Appeals of the United States, for the Ninth Circuit thereof, from an order and decree made and entered herein on the 31st day of May, 1921, discharging the writ and dis-

missing the petition for writ of Habeas Corpus filed herein.

Dated at Los Angeles, California, this 31st day of May, 1921.

Cooper, Collings & Shreve

Attorneys for Petitioner and Appellant Herein.

[Endorsed]: No. 2991 Crim IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. In the Matter of the Application of ALBERT SICHOFSKY, also known as ABRAM SICHOFSKY, for WRIT OF HABEAS CORPUS NOTICE OF APPEAL Orig. Rec'd 6 - 1 - 21 Robert O Connor U. S. Atty. F. Filed Jun 1 1921 Chas. N. Williams, Clerk By R S Zimmerman Deputy Clerk COOPER, COLLINS & SHREVE ATTORNEYS AND COUNSELORS 708 WASHINGTON BLDG. LOS ANGELES, CAL. PHONE 60277

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

In the Matter of the Application)	
of ALBERT SICHOFSKY, also	)	ASSIGNMENTS
known as ABRAM SICHOFSKY,	)	OF ERROR
for WRIT OF HABEAS)	
CORPUS.)	
)	

Now comes the petitioner and appellant in the above-entitled action, and makes the following assignments

of error which he avers occurred in denying the petition for the writ of habeas corpus herein and dismissing same.

FIRST

The Court erred in denying the petition for the writ of habeas corpus herein and in dismissing petitioner's petition; for the reason

(a) That the indictment does not charge any public offense.

(b) That said indictment does not charge any public offense for the reason that there was no law in existence at the time of the alleged indictment upon which petitioner could be charged with the offense alleged in the said indictment.

(c) That the Court erred in holding that the Court had not lost jurisdiction of the defendant in submitting defendant to the jurisdiction of the State Court.

(d) That the Court erred in not determining the status of the defendant concerning the conflict of judgments under which he stands sentenced.

(e) The Court erred in holding as a matter of law that under the petition and writ thereof there was proper or sufficient cause to remand the petitioner to the custody of the Marshall.

Respectfully submitted,

Cooper, Collings & Shreve

Attorneys for petitioner

[Endorsed]: No. 2991 IN THE DISTRICT
COURT OF THE UNITED STATES, IN AND

FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION In the Matter of the Application of ALBERT SICHOFSKY, also known as ABRAM SICHOFSKY, for WRIT OF HABEAS CORPUS ASSIGNMENTS OF ERROR Filed Jun 1 1921 Chas. N. Williams, Clerk Douglas Van Dyke Deputy COOPER, COLLINGS & SHREVE Attorneys and counselors 708 Washington Bldg. Los Angeles, Cal. Phone 60277 Petitioner and appellant

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

In the Matter of the Application)	
of ALBERT SICHOFSKY, also)	
known as ABRAM SICHOFSKY,	)	BOND ON
for WRIT OF HABEAS	)	APPEAL
CORPUS.)	
)	

KNOW ALL MEN BY THESE PRESENTS:

That we, Albert Sichofsky, also known as Abram Sichofsky, as principal and Abe Preluzsky and H. H. Appel, Jr. as sureties, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred Fifty (\$250.00) Dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves,

our heirs, executors and administrators jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-One.

WHEREAS, lately at the May term, A. D. 1921 of the District Court of the United States, in and for the Southern District of California, Southern Division, in a suit depending in said Court on application of Albert Sichofsky, also known as Abram Sichofsky, for a writ of Habeas Corpus, an order and decree was entered on the 31st day of May, 1921, discharging the writ and dismissing the petition for writ of habeas corpus filed therein, and the said Albert Sichofsky, also known as Abram Sichofsky, has obtained an order allowing an appeal by the said Albert Sichofsky, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit, in the City of San Francisco, in the State of California, within thirty (30) days from and after the date of said citation, which citation has been duly served;

Now the condition of the above obligation is such that should any costs be adjudged against said Albert Sichofsky, also known as Abram Sichofsky, in said appeal, he and the sureties above named will pay to the United States of America such costs as may be adjudged against said Albert Sichofsky, in said matter,

not to exceed the sum of Two Hundred Fifty (\$250.00) Dollars.

(SEAL) Alberto Sichofsky

(SEAL) Abe Preluzsky

(SEAL) H. H. Appel, Jr.

Approved:

Bledsoe

Judge of the District Court of the United States,
Southern district of California, Southern Division.

SOUTHERN DISTRICT OF CALIFORNIA, SS

Abe Preluzsky and H. H. Appel, Jr., being duly sworn, each for himself deposes and says that he is a householder in said District, and is worth the sum of Five Hundred (\$500.00) Dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

Abe Preluzsky

H. H. Appel, Jr

Subscribed and sworn to before me, this 2nd day of June, A. D. 1921.

Lewis D. Collings

Notary Public in and for the County of Los Angeles,
State of California.

The form of the foregoing Bond and the sufficiency of the sureties thereto is hereby approved.

Cooper Collings & Shreve

by John Cooper

(Seal)

Attorney for Appellant

[Endorsed]: No. 2991 IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIF. SOUTHERN DIVISION In the Matter of the Application of Albert Sichofsky, also known as Abram Sichofsky, for WRIT OF HABEAS CORPUS. BOND ON APPEAL Filed Jun 2 1921 Chas. N. Williams, Clerk Douglas Van Dyke, Deputy COOPER, COLLINGS & SHREVE ATTORNEYS AND COUNSELORS 708 Washington Bldg. Los Angeles, Cal. Phone 60277 for petitioner and appellant

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

In the Matter of the Application	)	PRAECIPE
of ALBERT SICHOFSKY, also	)	(FOR
known as ABRAM SICHOFSKY,	)	TRANSCRIPT
for WRIT OF HABEAS	)	OF RECORD)
CORPUS.)	
)	

TO CHARLES N. WILLIAMS, Clerk of the District Court of the United States, Southern District of California, Southern Division:

SIR:

Please make up transcript of appeal in the above-entitled case to be composed of the following papers:

1. Citation on appeal.
2. Petition for Writ of habeas corpus and all exhibits used or filed in connection therewith.

3. Order for writ of habeas corpus.
4. Writ of habeas corpus and return thereon.
5. Decision of the Court.
6. Petition for appeal.
7. Order allowing appeal.
8. Notice of appeal.
9. Assignment of errors.
10. Bond on appeal.
11. Praecipe.
12. Certificate of Clerk.

Dated June 8, 1921.

Cooper Collings & Shreve,
Attorneys for Petitioner and Appellant

[Endorsed]: No. 2991 IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION IN THE MATTER OF THE APPLICATION OF ALBERT SICHOFSKY, also KNOWN AS ABRAM SICHOFSKY, for WRIT OF HABEAS CORPUS AMENDED PRAECIPE (for transcript of record)
Received copy this 8th day of June 1921 Robert O'Connor U. S. Atty T. F. Green Asst U. S. Atty Filed Jun 8 1921 Chas. N. Williams, Clerk Douglas Van Dyke Deputy COOPER, COLLINGS & SHREVE ATTORNEYS AND COUNSELORS 708 WASHINGTON BLDG. LOS ANGELES, CAL. PHONE 60277

IN THE DISTRICT COURT OF THE UNITED
STATES, SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN
DIVISION.

In the Matter of the Application)
of ALBERT SICHOFSKY, also)
known as ABRAM SICHOFSKY,)
for WRIT OF HABEAS COR-)
PUS.)

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 50 pages, numbered from 1 to 50 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by Appellant and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the Citation on Appeal, Petition for Writ of Habeas Corpus and all exhibits used or filed in connection therewith, Order for Writ of Habeas Corpus, Writ of Habeas Corpus and return thereon, Decision of the Court, Petition for Appeal, Order Allowing Appeal, Notice of Appeal, Assignment of Errors, Bond on Appeal and Praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to , and that said amount has been paid me by the Appellant herein.

IN TESTIMONY WHEREOF, I have hereunto
set my hand and affixed the Seal of the Dis-
trict Court of the United States of America,
in and for the Southern District of Cali-
fornia, Southern Division, this day
of , in the year of our Lord
One Thousand Nine Hundred and Twenty-
one, and of our Independence the One Hun-
dred and Forty-fifth.

CHAS. N. WILLIAMS,
Clerk of the District Court of the
United States of America, in and
for the Southern District of Cali-
fornia.

By

Deputy.

1718

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

In the Matter of the Application of
ALBERT SICHOFSKY,
Also Known as Abram Sichofsky,
for Writ of Habeas Corpus.

Appellant's Points and Authorities on Appeal From Order
Denying Writ of Habeas Corpus.

JOHN S. COOPER,
LEWIS D. COLLINGS,
GEORGE H. SHREVE,
Solicitors for Albert Sichofsky, Applicant,

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IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

In the Matter of the Application of
ALBERT SICHOFISKY,
Also Known as Abram Sichofsky,
for Writ of Habeas Corpus.

**Appellant's Points and Authorities on Appeal From Order
Denying Writ of Habeas Corpus.**

*To the Honorable United States Circuit Court of Appeals,
for the Ninth Circuit, and to the Honorable
Erskine M. Ross, Justice Thereof:*

This is an appeal from an order denying a writ of *habeas corpus*.

As shown by the petition on file [Tr. p. 14], petitioner was charged by indictment as follows:

"That Abram Sichofsky, alias Alberto Sichofsky, alias Max Fimen, alias Carlos Nunn, whose full and true name is, other than as herein stated, to the grand jurors unknown, late of the Southern Division of the

Southern District of California, heretofore, to-wit, on or about the twenty-third day of August, A. D. 1920, when the United States was at war with the Imperial German Government, at Tia Juana, county of San Diego, within the state and Southern Division of the Southern District of California, and within the jurisdiction of the United States and this Honorable Court, did knowingly, wilfully, unlawfully and feloniously enter, and attempt to enter, the United States from a foreign country, to-wit, the republic of Mexico, without then and there bearing and having in his possession a passport, duly visaed in accordance with the terms of section 31 of an executive order dated August 8, 1918, issued pursuant to an act of Congress approved May 22, 1918, and entitled: "An act to prevent, in time of war, departure from and entry into the United States, contrary to public safety," and supplemental to the Presidential Proclamation of August 8, 1918, the said Abram Sichofsky, alias Alberto Sichofsky, alias Max Fimen, alias Carlos Nunn, being then and there a male citizen of Poland of the age of sixteen years and over."

This indictment was drawn under an act of May 22, 1918, which act in full is as follows:

(Sec. 1) (United States—entry or departure—restrictions—offenses.) That when the United States is at war, if the President shall find that the public safety requires that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclama-

tion thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—

(a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe;

(b) For any person to transport or attempt to transport from or into the United States another person with knowledge or reasonable cause to believe that the departure or entry of such other person is forbidden by this Act;

(c) For any person knowingly to make any false statement in an application for permission to depart from or enter the United States with intent to induce or secure the granting of such permission either for himself or for another;

(d) For any person knowingly to furnish or attempt to furnish or assist in furnishing to another a permit or evidence of permission to depart or enter not issued and designed for such other person's use;

(e) For any person knowingly to use or attempt to use any permit or evidence of permission to depart or enter not issued and designed for his use;

(f) For any person to forge, counterfeit, mutilate, or alter, or cause or procure to be forged, counterfeited, mutilated, or altered, any permit or evidence of permission to depart from or enter the United States;

(g) For any person knowingly to use or attempt to use or furnish to another for use any false, forged, counterfeited, mutilated, or altered

permit, or evidence of permission, or any permit or evidence of permission which, though originally valid, has become or been made void or invalid. (... Stat. L.)

(Sec. 2) (Necessity of passport.) That after such proclamation as is provided for by the preceding section has been made and published and while said proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter or attempt to depart from or enter the United States unless he bears a valid passport. (... Stat. L. ...)

(Sec. 3) (Punishment.) That any person who shall wilfully violate any of the provisions of this Act, or of any order or proclamation of the President promulgated, or of any permit, rule, or regulation issued thereunder, shall, upon conviction, be fined not more than \$10,000 or, if a natural person, imprisoned for not more than twenty years, or both; and the officer, director, or agent of any corporation who knowingly participates in such violation shall be punished by like fine or imprisonment, or both; and any vehicle or any vessel, together with its or her appurtenances, equipment, tackle, apparel, and furniture, concerned in any such violation, shall be forfeited to the United States. (... Stat. L. ...)

(Sec. 4) (Definitions—"United States"—"Person.") That the term "United States" as used in this Act includes the Canal Zone and all territory and waters, continental or insular, subject to the

jurisdiction of the United States. The word "Person" as used herein shall be deemed to mean any individual, partnership, association, company, or other unincorporated body of individuals, or corporation, or body politic. (... Stat. L. ...) [Tr. p. 4 *et seq.*]

The indictment herein, as above set forth, charges said entry on or about the 23d day of August, 1920, the executive order above set forth being dated August 8, 1918. As further set forth in said petition, on or about the 10th day of November, 1919, after the signing of the armistice on November 11, 1918, a subsequent act was passed by Congress, being entitled "Act of November 10, 1919, Chap. 104-41 Stat. L. 353," which act is fully set forth in the transcript, page 8, and is in the same words as the act of the 22d day of May, 1918, except that the preamble of the original act reads "That when the United States is at war," and that of the second act reads "That if the President shall find that public safety requires."

Upon these acts, and the additional act, or joint resolution of Congress, of date March 3, 1921, section 3115, entitled "Termination of War-time Acts," petitioner contends that there was no law in force at the time he plead guilty to the indictment herein, to-wit, on the 21st day of March, 1921, upon which he could be convicted; and further, as will be more specifically set out, that after said plea the court lost jurisdiction of his person by reason of the court's action in surrendering his person in custody to the state courts of the state of California.

The opinion of the trial court upon the questions at issue is contained in transcript, page 33 *et seq.*, and we shall deal with the question as presented in the court's opinion:

Point One—The Law Was Repealed.

Our first contention is that, the war having ceased on November 11, 1918, the necessity for the law ceased, and therefore that there was no law in existence at the time of the passing of the act. Upon this question there is little, if any, law in this country, the leading case, however, being

Hamilton v. Ky. Distillers & Warehouse Co.,
251 U. S. p. 146,

wherein, in one of the most ably reasoned opinions of the Supreme Court, Judge Brandeis decided the question of the Volstead Act, and held that for the purpose of this act war still continued, citing in support thereof

Hijo v. United States, 194 U. S. 315, 323, 24
Sup. Ct. 727, 48 L. Ed. 994;

The Protector, 12 Wall. 700, 702, 20 L. Ed.
463;

United States v. Anderson, 9 Wall. 56, 70, 19
L. Ed. 615,

these cases dealing with the determination of the Civil War, examination of which cases will show that the Supreme Court in those cases held that, so far as the Civil War was concerned, in respect to the several states, the war began and ended upon different dates.

As well it was held in these cases that the determination of war was an executory and not a judicial power. However, as pointed out in the Hamilton case, the present war has a different status. In the Civil War there were only two belligerents, while in the present war the United States was only an ally of European sovereignties, and prior to the date of this indictment peace had been ratified by these European sovereignties.

We therefore contend, as an original proposition, as pointed out by Judge Brandeis' opinion, that this court, and the trial court, should have taken judicial notice of all the facts connected with the present war, and in such case should have held that the war is ended; and in support of our contention we respectfully refer to the Hamilton case, above mentioned. In addition thereto we contend that the act of November 10th, 1919, was a direct repeal of the act of the 22d day of May, 1918, in that said act dealt with the same subject matter, prescribed the same penalty, and conferred the same power upon the President of the United States.

In interpretation of statutes, it is well put in 36 Cyc., at page 1096:

“* * * it is a well-settled rule that where a statute prohibits a particular act, and imposes a penalty for doing it, and a subsequent statute imposes a different penalty for the same offense, the latter statute operates by way of substitution and not cumulatively, and repeals the former, and

this whether the penalty is increased, or diminished; the intention to inflict two punishments for the same offense not being imputable to the Legislature. * * * An act intended to be a complete system of statutory laws relating to crimes and punishments supersedes or repeals all existing laws on that subject.”

And a number of cases are cited under this rule; among others are the following United States cases:

U. S. v. Tynen, 11 Wall. (U. S.) 88, 20 Law. Ed. 153;

Norris v. Crocker, 13 How. (U. S.) 429, 14 Law. Ed. 210;

U. S. v. Claflin, 97 U. S. 546, 553.

It Is an Elementary Question of Statutory Construction, Where Two Acts Are Clearly in Conflict, and It Appears That the Latter Was Intended as a Substitute for the First, the Latter Repeals the Former.

“A statute may be repealed by implication as well as in direct terms; and it is well settled, that where a subsequent act is repugnant to a prior one, the last operates without any repealing clause, as a repeal of the first; and where two acts, passed at different times, are not in terms repugnant, yet, if it is clearly evident that the last was intended as a revision or substitute of the first, it will repeal the first to the extent in which its provisions are revised or substituted.”

Pierpont v. Crouch, 10 Cal. 315, 316.

“Every statute must be considered according to what appears to have been the intention of the Legislature, and even though two statutes relating to the same subject be not in terms repugnant or inconsistent, if the later statute was clearly intended to prescribe the only rule which should govern the case provided for, it will be construed as repealing the original act.”

City v. Bird, 15 Cal. 295, 296.

“When the Legislature makes a revision of particular statutes, and frames a general statute upon the subject matter, and from the framework of the act it is apparent that the Legislature designed a complete scheme for this matter, this is the legislative declaration that whatever is embraced in the new law shall prevail, and whatever is excluded is ignored.”

State v. Conkling, 19 Cal. 501, 513.

See also:

Peo. v. Burt, 43 Cal. 560;

Peo. v. Lon Me, 49 Cal. 355;

Treadwell v. Board etc., 62 Cal. 563;

In the Matter of Yick Wo, 68 Cal. 294;

Charnock v. Rose, 70 Cal. 189;

Frazer v. Alexander, 75 Cal. 147, 153.

and as well:

Read v. Thurmand, 269 Fed. p. 252;

U. S. v. Shathoff, 268 Fed. p. 417.

It is with reference to statutes defining crimes and providing their punishment that repeals operate with the utmost freedom. In such cases the extinction of the statute is understood to be an indication that the sovereign power no longer desires the former crime to be punished or regarded as criminal. Therefore, when such a statute is repealed, it is as if it never existed except for the purpose of proceedings previously commenced, prosecuted, and concluded, and even a plea of guilty before the repeal will not authorize the court to pass sentence.

25 Ruling Case Law p. 194.

See also:

Crow v. Cartledge, 99 Miss. 221, 54 So. 947,
Ann. Cas. 1913E 470;

Trippet v. State, 149 Cal. 521, 86 Pac. 1084,
8 L. R. A. (N. S.) 1210 and note.

Note:

94th Am. Dec. page 218.

Such being the case, the Government in this case had no right to pronounce the sentence herein pronounced.

In addition thereto, by the act of December 24, 1919, the act being the Appropriation Bill, for 1920, the act provides as follows:

“That so much of the sum of \$600,000 appropriated by section 4 of Public Act Numbered 79 of the Sixty-sixth Congress, entitled ‘An act to regulate further the entry of aliens in the United

States,' as may be necessary is hereby made immediately available for expenses of regulating entry into the United States, in accordance with the provisions of the act approved May 22, 1918; provided, that not more than \$450,000 of said sum shall be made during the remainder of the fiscal year 1920."

Fed. Stat. An. 1919, Sup. p. 75.

In the case at bar we respectfully invite attention to the fact that under the indictment herein defendant is charged with entry without having the passport visaed, in accordance with the terms of section 31 of the executive order, dated August 8, 1918, which is as follows:

"Subject to the exceptions and limitations hereinbefore set forth no alien shall be allowed to enter the United States unless he bears a passport duly visaed in accordance with the terms of the Joint Order of the Department of State and the Department of Labor issued July 26, 1917. Said Joint Order and the amendments thereto and instructions issued thereunder are hereby confirmed and made part hereof by reference, so far as their provisions are not inconsistent with these rules and regulations, or with the President's proclamation of August 8, 1918. A copy of said Joint Order is inserted in the appendix to these regulations."

In other words, the defendant is nowhere charged with a violation of the act, but of the violation of the proclamation under the act. The act itself specifically provides (section 3) that "any person who shall wil-

fully violate any of the provisions of this act, or any order or proclamation of the President promulgated, shall be," etc.

In dealing with acts of this character it has been repeatedly held that while Congress may have the right to exclude aliens in any manner they see fit, that when Congress sees fit to promote such a policy further by subjecting the persons to infamous punishment, that such a statute immediately becomes a penal law, subject to strict interpretation; as Congress has no police powers,

Ocean Steamship Co. v. Stranahan, 214 U. S. 320;

Keller v. U. S., 213 U. S. 138;

U. S. v. Robertson, 257 Fed. 195, opinion by Judge Trippet;

or, as otherwise stated, criminal statutes must be strictly construed, and in the event of doubt, such doubt shall be resolved in favor of the accused. The rule of reasonable doubt is applicable to the law, as well as the facts of the case.

Joplin Mercantile Co. v. U. S., 236 U. S. 531.

And as well, the repeal of a criminal statute operates as a repeal of the statute in its entirety, and does not permit the pronouncing of judgment thereon unless there is a saving clause thereto.

Wheaton v. U. S., 5th Cranch. 281;

Extended note *In re* Cline, 1 Ann. Cases 219.

In the case at bar it is first contended that the act ceased to be effective because the necessity for said act no longer existed, which necessity ceased prior to the time that said act of the defendant was committed.

Hamilton v. Ky. Distillers, 251 U. S. 146.

If it can be now contended that said act was not repealed by necessity prior to the time of its commission, then that act was directly repealed by the act of November 10, 1919, being the same act in revised form, and by the joint resolution of Congress of date March 3, 1921, section 3115, entitled "Termination of War-time Acts. Certain acts, resolutions and propositions terminated. Exception certain acts repealed." To which act is added the saving clause, to-wit:

"Nothing herein contained shall be held to exempt from prosecution or relieve from punishment any offense heretofore committed in violation of any act heretofore repealed, or which may be committed while it remains in force as herein provided."

This saving clause is no broader than is the saving clause of date February 25, 1871, which clause reads, "The repeal of any statute shall not have the effect to release or extinguish any penalty," etc., which saving clause is directly referred to and considered in the case of U. S. v. Reisinger, 128 U. S. 398, and which saving clause is practically identical with section 329 of the Political Code:

"The repeal of any law creating a criminal offense does not constitute a bar to the indictment

or information and punishment of an act already committed in violation of the law so repealed, unless the intention to bar such indictment or information and punishment is expressly declared in the repealing act. (Amendment approved 1881; Stats. 1881, p. 6.)”

The contention of the trial court is that these saving clauses save this act, but, as above pointed out, it must be borne in mind that the defendant is nowhere charged with a violation of said act, but a violation of the Presidential proclamation. We have made diligent search and will continue to do so for a case under a Presidential proclamation or rule which has been repealed, but so far we have been unable to find any. However, there are a line of cases under a similar state of facts which are positively and directly in point, the leading case being the case of *Spears v. County of Modoc*, 101 Cal. p. 303. In this case by a mere statute the county was permitted to pass a liquor ordinance. Pursuant to this liquor ordinance defendant was arrested, but before final judgment the ordinance upon which he was convicted was repealed, without a saving clause. The contention being in that case that even though the law had been repealed, that prosecution could still follow. Judge Harrison in that case states as follows:

“The effect of repealing a statute is to obliterate it as completely from the records of the parliament as if it had never passed; and it must be considered as a law that never existed, except

for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law. This principle has been applied more frequently to penal statutes, and it may be regarded as an established rule that the repeal of a penal statute without any saving clause has the effect to deprive the court in which any prosecution under the statute is pending, of all power to proceed further in the matter. 'The repeal of a statute puts an end to all prosecutions under the statute repealed, and to all proceedings growing out of it pending at the time of the repeal.' (Sedgwick's Statutory and Constitutional Law, 130. See also Endlich on Interpretation of Statutes, Sec. 479.)"

And as well it was therein stated that while section 329 of the Political Code above referred to had a saving clause, that this saving clause only had relation to the penal laws passed by the Legislature, and had no relation whatsoever to the ordinances permitted to be passed pursuant to a general law.

This doctrine above stated has been approved in *Barton v. Gadsden*, 79 Ala. 495; *Rutherford v. Swenk*, 96 Tenn. 564; from which it follows that, as stated by Justice Lamar in the case of *U. S. v. Reisinger*, that a prior Legislature has no right to control a future Legislature, and if Congress had so desired to make offenses under Presidential proclamations offenses which could be punished after the repeal of such proclamation, it could do so by the saving clause therein contained.

From which we respectfully contend that the act above set forth has been repealed, without a saving clause, and, as set forth in the petition for writ heretofore filed, there was no law in existence at the time said judgment was pronounced, under which the defendant could be legally prosecuted.

Point Two—The Court Lost Jurisdiction of the Defendant.

Our second contention is that it is a well-settled law of this state that in a case of conflicting jurisdiction between state and federal courts, it is the settled doctrine of this court that a court having possession of a person cannot be deprived of the right to deal with such person until its jurisdiction is exhausted, and that no other court has the right to interfere with such custody or possession.

Ableman v. Booth and U. S., 16 Law Ed.
p. 506.

Ex parte Johnson, 17th Sup. Ct. Rep. p. 735.

It is clear that the rights and duties of a court, under such a law, even admitting that the defendant plead guilty to a valid law, consist of but one, and that duty was to issue a commitment and forthwith transmit the prisoner to McNeill's Island.

In re Jennings, 118 Fed. p. 479.

If such is not done, the court having granted an unlawful stay, which stay prejudices and interferes with the rights of the defendant, such unlawful stay divests

the court of jurisdiction further to proceed in this matter.

The rule is announced in 8th Ruling Case Law p. 422, and again *In re Webb*, 89 Wis. 354 (46th Am. St. Rep. p. 846), as follows:

“A court cannot suspend the execution of its sentence pronounced in a criminal case, except as an incident to the review of the case upon writ of error, or upon other well-established legal grounds. Therefore, if it does by its order, after sentencing the accused to imprisonment for a term specified, purport to suspend such imprisonment until the further order of the court, it cannot, after the expiration of the term specified, direct his imprisonment, though during such term he was at liberty, and suffered no imprisonment whatever.”

In the case at bar, as shown by the petition, the defendant made no request for stay of execution, beyond a five-day period, but such request was made upon the application of the district attorney, and thereafter the court permitted said stay to be further extended.

Upon the second point referred to, in *Ableman v. Booth*, 21 Howe 506, and *Ex parte Johnson*, 167 U. S. 120, it is stated:

“It is a well-settled law that a court having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted, and that no

court has the right to interfere with such custody or possession,”

or, as has been otherwise stated:

“Comity between federal and state courts is necessary to prevent scandal from unseemly conflicts of jurisdiction and to promote a decent and orderly administration of justice. It has been considered that the exercise of jurisdiction by a federal court becomes one of discretion, where the only reason why it should not take cognizance of a cause rests on the ground of comity; * * *. Where a state and a federal court have concurrent jurisdiction over the same parties or privies and the same subject matter, the tribunal where jurisdiction first attaches retains it exclusively, and will be left to determine the controversy and to fully perform and exhaust its jurisdiction, and to decide every issue or question properly arising in the case. This jurisdiction continues until the judgment rendered therein is fully satisfied.”

15 C. J. 1160-1161.

Such being the case, we respectfully insist that the court having had jurisdiction over Sichofsky, that the jurisdiction should have been retained until exhausted, and that by doing any act which permitted another court to take jurisdiction that such jurisdiction of the federal court was lost and cannot now be recalled.

In the case of *People v. Barrett*, 95 Am. State Rep. 230, the court therein held that the trial court has no jurisdiction to indefinitely suspend sentence after con-

viction. As well this subject is fully covered in *Ex parte* U. S., 242 U. S. p. 27, wherein the opinion by Chief Justice White deals with the history of the law, and what can be done by a court after sentence has been imposed. The reason for the rule is stated in the Barrett case as follows:

“There can be no doubt that a court has the right, in a criminal case, to delay pronouncing judgment for a reasonable time, for the purpose of hearing and determining motions for a new trial or in arrest of judgment, or to give the defendant time to perfect an appeal or writ of error, or for other proper causes; but to suspend indefinitely the pronouncing of the sentence after conviction or to suspend indefinitely the execution of the judgment after sentence pronounced, is not within the power of the court. To allow such a power would place the criminal at the caprice of the judge. If the judge can delay the sentence one year, he could delay it for fifteen years, or any length of time.”

See also U. S. v. Wilson, 42 Fed. p. 748, wherein it is distinctly stated that the court had no power to suspend sentence, except for the short periods pending determination of motions, or considerations arising in the cause after verdict.

See also:

Mentor v. U. S., 244 Fed. p. 422;

Ex parte Clendenning, 19 L. R. A. (N. S.)
1041.

In the case at bar, as will be pointed out, the defendant was not present at the time the order was made transferring him to the state court. In the case of *Schwabb v. Berggren*, 143 U. S. 442, it was therein distinctly held that the defendant had the right to be present at all stages of the proceedings, and certainly where an order was made, as was made in this case, after judgment, suspending execution thereof, so as to deprive defendant of one of his rights, the court exceeded its jurisdiction; first, by making an order not in the presence of the defendant; second, by making an order which might prejudice his rights.

The original writ in this action (page 21) was directed to the United States marshal, and also to the sheriff of Los Angeles county. In the return herein, the sheriff of Los Angeles county, in whose custody the prisoner was confined, sets forth fully the commitment by the Superior Court of Los Angeles county, which commitment certainly would not have issued had not the federal judge released the custody of the defendant, in the state courts, and it is quite clear now that both the commitment in the state court and in the federal court are now outstanding commitments.

Closing Argument.

Both the points above made we believe to be original points, insofar as the citation of authorities is concerned. As to the first point, as above set forth, we contend that the law was repealed by direct enactment, by necessity, and by the joint resolution of Congress.

Treated singly there might be some reason for doubt, but treated collectively we cannot see how the trial court could have said that there was no repeal of this law.

In the first place, the act of 1919, taking place as it did, at a time when the peace treaty was offered for ratification by Congress and the Senate, and refused, it clearly showed the intention of Congress to repeal the war-time Immigration Act, and to give the President powers thereunder.

Second, the enactment of this act, and the actions of our allies during this period, clearly showed that the war had ceased.

Third, the joint resolution of Congress, on March 3, 1921, clearly showed that Congress intended to directly repeal this and all allied acts.

Such being the case, we respectfully contend that all these facts, taken together, show a repeal of the act in question.

Upon the question of loss of jurisdiction of the person of the defendant, by permitting the defendant to be tried by the state court while in custody, and under commitment of the United States courts, we again contend that this procedure was a loss of jurisdiction by the United States court. It is never our desire to in any way criticise the opinion of a trial court, or an appellate court, for the writer of this brief is of the opinion that as between lawyers and judges, upon an

original question, there is always reason for, and the right to a diversity of opinion. However, we wish to call the court's attention to the reasoning of the trial court, as set forth in his opinion [Tr. p. 38], where it is stated:

"It is asserted, however, that the court lost all of its jurisdiction thus acquired in virtue of the order made permitting the petitioner, all the while in custody of the United States marshal, to be tried in the state court as for the crime of grand larceny. It may be true, yet this court having no concern with the matter does not express any opinion thereon, that in view of the jurisdiction of this court attaching to the person of the defendant in the behalf and respects hereinabove enumerated and referred to, the Superior Court of the state of California could and did acquire no jurisdiction to try him, at the time it did, as for an asserted violation of the law of the state of California. If that be so and if that court lacked jurisdiction, it will be so determined in appropriate tribunals. I discover nothing, however, based either upon reason or authority, from which it may now be adjudged that the action of this court intemporarily staying the execution of the judgment of this court, served to divest this court of jurisdiction to require petitioner to stand for judgment as for the admitted violation of the federal law. It would be a strange and bold assertion, in my judgment, for this court, possessing the amplest jurisdiction as above referred to, to hold that it had completely divested itself of all jurisdiction in the premises merely by an order staying execution. I see nothing in the decision relied upon by petitioner (*In re Jennings*, 118 Fed. 479) requiring such conclusion."

Such opinion, in itself, seems to answer the question above stated.

At the time that the order staying execution was made, as set forth in the petition, the defendant was not represented by counsel, nor was he in any way advised of his rights. The order was made *ex parte*, and upon application of the district attorney of Los Angeles county. If a trial judge possesses the jurisdiction to release a defendant, to take him to Los Angeles to be tried, to San Francisco, or any other place, it might as well be said that a trial court, if it saw fit, might permit a marshal of the United States Government, or a sheriff of any county, to take a prisoner, convicted and ordered to a penitentiary, to the South Sea Islands, for the indefinite period of ten or fifteen years, at which time he might return the prisoner to the court, and say that he must serve his time.

Jurisdiction in a criminal matter primarily means jurisdiction of the person, and, as pointed out in the cases above cited, as to questions of comity, while a state or the Government may have equal right of jurisdiction over the person of a defendant, the one which first exercises it exercises it to the exclusion of the other; and it may be added, as an idiom to the above maxim, that the state or government which surrenders jurisdiction of the person of a defendant in a criminal matter, by comity or otherwise, to the other jurisdiction, loses it to all intents and purposes.

From all of which we respectfully insist that the order denying petitioner writ of *habeas corpus* herein should be reversed, with directions to release the prisoner.

Respectfully submitted,

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Solicitors for Albert Sichofsky, Applicant,

